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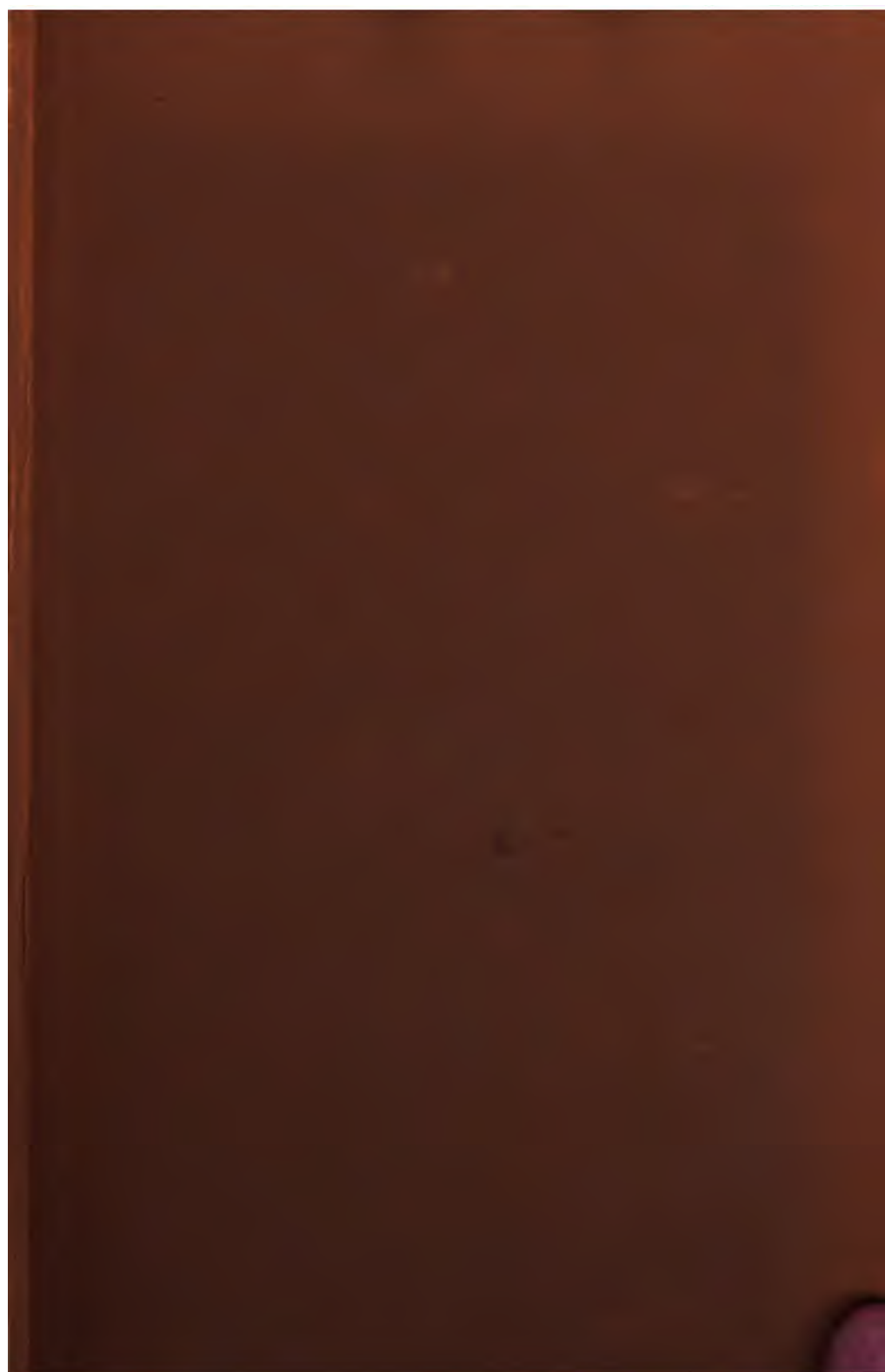
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ON THE
CONSTITUTION AND PRACTICE
OF
COURTS MARTIAL

LONDON
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REMARKS
ON
THE CONSTITUTION AND PRACTICE
OF
COURTS MARTIAL

WITH A SUMMARY OF THE LAW OF EVIDENCE AS
CONNECTED THEREWITH, AND SOME NOTICE OF THE CRIMINAL LAW OF ENGLAND
WITH REFERENCE TO THE TRIAL OF CIVIL OFFENCES

BY CAPTAIN THOMAS FREDERICK SIMMONS, R.A.

FIFTH EDITION, REVISED

LONDON
JOHN MURRAY, ALBEMARLE STREET
1863

BY THE SAME AUTHOR.

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ADVERTISEMENT

TO THE

FOURTH EDITION.

As the name of the late Captain Simmons alone appears in the title-page, it is considered right to explain the circumstances under which this work is now, for the fourth time, presented to the public. In obedience to the wishes of the Author, his eldest son, then Major of Brigade in the North Eastern District, revised it for a third edition, which was published in 1843. Before he left the army he repeated his revision, and he is responsible for the alterations which have been made for the present edition. The third edition has been out of print for several years, but the delay has afforded an opportunity of noticing the recent amendments in the criminal law and the law of evidence, and of introducing much additional information, collected by Captain Egbert Simmons,* 5th Fusiliers, Deputy Judge Advocate at the Mauritius.

* In 1857 a new edition by Major Egbert Simmons was announced, but at that very time, he was unexpectedly ordered on active service. In the absence of the Lieutenant Colonel, who had been appointed to a brigade shortly after the Fifth landed in India, Major Simmons commanded the regiment during the whole of the operations, which were closed by the relief of Lucknow on the 25th September.

Major General Sir J. Outram, in his orders of the 26th September, speaks of the 5th Fusiliers as having "led the column on the 25th instant under a "most murderous fire." Their loss was very heavy in this desperate strug-

gle, but it was not until the 29th of September, that, in a successful sortie from the Residency,— again to quote the gazette—"we had the misfortune "to lose Major Simmons, who was "killed by a musket-shot, whilst leading his men into the most advanced "building." Sir James Outram, in his despatch of the following day, speaks of this operation as being "attended "with the serious loss of one officer "and fifteen men killed and missing, "the officer killed being Major Simmons, Commanding Her Majesty's "Fifth Fusiliers, most deeply regretted "by the whole Army."—*London Gazette Extraordinary*, February 17, 1858.

The periodical revision of the Mutiny Act and Articles of War, and the occasional issue of subsidiary regulations, although affording peculiar facilities for the progressive improvement of military law, have an obvious tendency to render it especially fluctuating in its minor details; but it is believed that all the latest orders and regulations, bearing on the subject, have been referred to, and, wherever deficiencies are observed, the reader may be assured that they have not arisen from any want of conscientious endeavour to adapt these pages to the *existing* state of the Law and Practice of Courts Martial.

LONDON: October 1851.

POSTSCRIPT — FIFTH EDITION.

THIS Edition has been carefully revised throughout with reference to the Mutiny Act and Articles of War of the present year, the Naval Discipline Act, 1861, the Criminal Law Consolidation Acts and other recent statutes, and the Queen's Regulations for the Army, dated 1st December, 1859, and the Warrants, Orders, and Circulars now in force.

DALTON HOLME:

31st December, 1862.

PREFACE

TO

THE FIRST EDITION.

THAT it is expedient for officers of the army to make themselves acquainted with that system of laws, to which, as soldiers, they are subject, is too obvious to require elucidation. That it is their duty, is evident from a consideration of the nature and responsibility of the judicial character, which, in the course of their service, they are constantly called on to assume. The obligation is rendered still more imperative by the orders for the army, which expressly declare, that “The duties attached to officers on courts martial, are of the most grave and important nature; and, in order to discharge them with justice and propriety, it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law, and to make themselves perfectly acquainted with all orders and regulations, and with the practices of military courts.” By close and assiduous attention to the proceedings of Courts Martial, a sufficient fund of information may perhaps be collected; but the results of individual observation are gradual and confined; and he, who relies solely on the conclusions of his own experience, will, in *the mean time*, be often called to the exercise of functions, his knowledge of which cannot as yet

have attained much accuracy and consistence. Works on the practice of Courts Martial and on the subject of Military Law are therefore indispensable. Several do indeed exist, but they do not appear to have afforded all the information required by the army; nor are they, in all cases, immediately subservient to practical purposes, nor accommodated invariably to the existing state of the law, and to the general orders which have appeared on the subject within the last few years. Besides which, former publications on the subject are, in a great degree, rendered obsolete by the recent revision of the Mutiny Act and Articles of War.

Such are the considerations which led to the compilation of the following essay; and if, in its progress, the author has succeeded in obviating some difficulties attendant on acquiring the knowledge of the practice of Military Courts, and of the nature and extent of the power imparted to them by the legislature, his principal object will be attained. Whatever may be thought of the manner in which he has executed his design, it will be admitted that the design itself is by no means unimportant and uncalled for.

The Mutiny Act and Articles of War tend reciprocally to throw light on each other in cases which require elucidation, and where the ordinary rules for interpreting statutes are insufficient; but, in fixing the meaning of the Articles of War, where the pleasure of His Majesty has been expressed, it is decisive; and as the custom of the army can only have originated in orders, or have been adhered to under the sanction of the King, so must the opinion of His Majesty, as to the usage of the service, be received as equally conclusive. In this view, the author has attentively considered most of the orders, which have appeared since the accession of his late Royal Highness the Duke of York to the command of the army; an epoch ever memorable in the history of Great Britain, as being the commencement of that era, in which the British army has been as conspicuous amongst the armies of Europe for

discipline and tactics, as it has always been for patriotism and valour. If the few opinions which the author has ventured to offer on points which have been at times disputed, are not, in each case, supported by reference to a general order; as he believes them to have been inculcated by practice, so he hopes they will be recognised as in unison with the prevailing customs of the service.

In prosecution of the object of the present undertaking, it was found absolutely necessary to advert to the general rules of evidence in the common law courts of the country, and to the more prominent features of the criminal law of England, which, by the operation of the hundred and second* Article of War, Courts Martial have frequently to dispense in places beyond the seas, where there may be no form of British civil judicature in force. To this end, the author has consulted, with what attention he could, such works on evidence and jurisprudence as came within his reach. That his enquiries have been conducted with the judgment and exactness of a practised lawyer, he dares not flatter himself; and if he be accused of presumption, in attempting a subject confessedly beyond his grasp, the only plea he can advance against the charge is, that, in the discharge of his military duties, he felt it necessary to make some enquiries into the law of evidence and the criminal law of England, and the result he arranged into the present form, and is induced, by the observations of some brother officers, to offer to the army;—not by any means as a complete summary of all that may be requisite to be known on the subject; but as embracing the most obvious points, which, in the course of his reading, appeared to a soldier to be connected with, or throw light on, the administration of Military Law; and which may be most required in cases where Courts Martial have to supply the place of courts of civil judicature of the country.

* The hundred and forty-fifth article. (1862.)

If a good lawyer could be grafted on a soldier of common observation, and possessing a certain experience in the army, a perfect treatise on Military Law might be produced; but as to the separate efforts of the lawyer and the soldier, it is to be apprehended that the *legal* faults which must exist in the essay of the one, would be more than equalled by the unmilitary feeling which would inevitably insinuate itself into and pervade the work of the other. Nor is it probable that these defects would be overcome by combining, in a joint treatise, the knowledge and experience of both: the precise research, which the lawyer may uninterruptedly pursue, ill accords with the desultory habits, which are unavoidable by the soldier: and the parts would be so incapable of amalgamation, that the work itself, however valuable intrinsically, would yet be too discursive for the purpose of general information,—not readily made use of as a book of reference,—and consequently, as a practical work, of little utility. A perfect treatise on Military Law cannot, for these reasons, well be expected;—it would be necessary that acquirements should be combined in the same individual, which perhaps are in themselves incompatible and inconsistent.

The author is very far from supposing that his work will be free from errors and imperfections. He has no doubt but that, in its limited degree, it will tend to strengthen the opinion entertained by some since the time of Tacitus: "*Militaribus ingeniis subtilitatem deesse, quia castrensis jurisdictio, secura et obtusior, ac plura manu agens, calliditatem fori non exerceat;*" yet he confesses that, if he anticipated severity of criticism, he should be much more solicitous as to the opinion which may be entertained of the military, than of the *legal* part of the work. Upon the one subject, he ought to be well-informed, or the experience of four-and-twenty years must have been indeed abortive; on the other, his information must be secondary; and if adequate to the duties of a British Officer, and proportioned to the

general knowledge required in an English gentleman, it is all that can be fairly expected.

Utility, not novelty, a practical compilation, rather than an original essay, being the object of the author, he has not scrupled to adopt whatever matter he could find applicable to his purpose. In every case, he has, so far as he is aware, acknowledged the extent of the obligation; yet, as parts of this work were compiled from notes, made at different periods and without any view to publication, it is very possible that, in some instances, he has omitted to make due acknowledgment.

With respect to the manner and arrangement of this essay, essentially imperfect as the author well knows it to be, if it be calculated to convey, with tolerable distinctness, his meaning to the minds of those for whom it is intended, it is all that has been aimed at: it pretends neither to logical precision, nor to adventitious ornament. For the army the work was undertaken; and to the younger part of the army, the author fancies it may not be without its use: whether he is deceived or not, remains to be proved. One point is very certain; if the essay be useful, it will ultimately need no apology; if not calculated to be of service, no apology can extenuate its defects; though, perhaps, integrity of motive may be received in palliation of the erroneous judgment which the author had formed of the utility of his performance.

18th September, 1830.

CORRECTIONS AND ADDITIONS.

Page 10, § 32, line 5	for "or other misdemeanor"	read "or misdemeanor"
" 18, n. (9), line 2	" "sec. 43"	" "§ 43"
" 43, § 99, last line	" "§ 40"	" "§ 52"
" 53, n. (8), line 2	" "§ 1023"	" "§ 1018"
" 55, § 133, line 1	" "sixty-second"	" "sixty-sixth"
" 61, § 148, line 2	" "fourteenth"	" "fortieth"
" 61, § 150, line 5	" "sec. 165"	" "§ 165"
" " "line 7	" "sec. 200"	" "§ 200"
" 63, § 158, line 14	" "sec. 231"	" "§ 231"
" 74, line 6	after "must"	add "without such permission"
" 111, n. (6), line 4	" "judge advocate"	" "at district and garrison courts martial"
" 117, § 312, line 1	" "cannot"	" "without the requisite permission"
" 122, § 334, line 4	for "§ 437"	read "§ 347"
" 124, last line	" "§ 1012"	" "§ 1001"
" 196, § 511, line 8	" "§ 647"	" "§ 947"
" 307, n. (5)	" "§ 859"	" "§ 861"
" 377, line 4	" "expulsion"	" "exclusion"
" "n. (3)	" "§ 272"	" "§ 222"
" 435, n. (5)	" "§ 1039"	" "§ 1139"

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ON THE

CONSTITUTION AND PRACTICE

OF

COURTS MARTIAL.

CHAPTER I.

CONSTITUTION AND COMPOSITION OF COURTS MARTIAL.

1. COURTS MARTIAL formerly¹ derived their authority exclusively from the crown. A series² of the earlier mutiny acts contained a special clause which expressly provided that neither 'the acts nor anything contained in them should extend to abridge' this branch of the royal prerogative, so far as it might prevail beyond the seas.

Formerly the sovereign constituted courts martial by an exercise of prerogative,

2. In the present day, an analogous distinction is still indirectly preserved in the terms in which the mutiny act declares the powers of the crown: it enacts³ that Her Majesty "may, from time to time, in like manner as has been heretofore used, grant commissions under the royal sign manual, for the holding courts martial *within* the united kingdom of Great Britain and Ireland,"—no mention being made of commissions granted to hold courts martial *elsewhere* out of the same. The mutiny act is now also silent

since abridged within the realm, but

recognized out of the same;

(1) The first mutiny act (1 Will. & Mary, c. 5) was passed the 3rd April, 1689. &c. Compare 12 Anne, c. 18 (*al. c. 12*). s. 43, &c.

(2) 1 Anne, c. 16, s. 37; 2 & 3 Anne, c. 20, s. 37; 3 & 4 Anne, c. 16, s. 38, 1850, 1849, &c., "Be it declared and enacted."

as to the composition of general and district or garrison courts martial held out of the British Isles. Besides the general power of granting commissions "to hold courts martial," the mutiny act, in the sequel of the declaration referred to above, declares the power of Her Majesty to "grant commissions or warrants under the royal sign manual to the chief governor or governors of Ireland, the commander of the forces, or the person or persons commanding in chief, or commanding for the time being, any body of troops at home or abroad," "for convening courts martial" themselves, and also for authorizing officers "under their respective commands to convene courts martial," with this limitation, "that the officer so authorized be not below the degree of a field officer, except in detached situations beyond seas where a field officer is not in command, in which case a captain may be authorized to convene district or garrison courts martial."⁴

3. The provisions of the mutiny act at first extended only to those courts martial which were held for the trial of capital offences. The authority for convening *all* courts martial of inferior jurisdiction continued to depend on the royal prerogative or the general power of making articles of war. Even in the present day,—when *all* general courts martial, and the more recently created district or garrison courts martial, are placed on the same footing as to their constitution,—the mutiny act, though it decrees certain powers to regimental and detachment courts martial, and regulates their composition, is nevertheless altogether silent as to the mode of their assembly. The articles of war expressly convey Her Majesty's command for the holding of regimental⁵ courts martial 'by the appointment of the colonel or other commanding officer' ('not under the rank of captain') 'without other authority than these our rules and articles of war;' and for holding detachment courts martial,⁶ also without any other authority, by the appointment of the senior officer not being under the rank of captain, or, if on board ship, "whatever be his rank."

4. Besides courts martial assembled by the authority of the sovereign, either direct or delegated, the mutiny act makes

the sovereign
now does so by
statute,

issuing warrants
for convening
courts martial,

directly and
mediately,

with a limit-
ation as to rank;

and granting
powers to hold

certain courts
of inferior juris-
diction

without other
authority than
the articles of
war;

and irrespective
of the limitation
as to rank ap-
plying to the
convening of
superior courts.

The mutiny act
legalises the con-
vening of courts

(4) Mut. Act, sec. 6.

(5) Art. War, 115.

(6) Art. War, 116.

it "lawful" in certain special cases beyond the seas for any officer to convene a detachment general court martial, to which it assigns the same powers in regard to sentence upon offenders as are *granted* by the act to general courts martial. And Her Majesty's pleasure is expressed in the articles of war that a court martial of this description may be assembled by any officer, notwithstanding he "shall not have received any warrant empowering him to assemble courts martial."⁷

martial in certain cases beyond seas, without authority from Her Majesty.

5. Thus it is evident that courts martial, (notwithstanding the prejudice raised against them by some learned lawyers, whose remarks might rather, with propriety, be applied to martial law and the ancient courts of chivalry than to the law military and courts martial, modified and restrained as they now are, and have been from the time of the revolution of 1688,) are as strictly part and parcel of the law of England, as any courts depending on statute can be. It has been aptly observed by Mr. Tytler,⁸ that the mutiny act is, by the very limited terms of its duration and frequency of its renewal, more truly and immediately framed by the people itself, than any other of the existing statutes of the realm.

Courts martial neither illegal nor unconstitutional.

6. In conformity with the power conveyed by the mutiny act, warrants under the sign manual annually issue to generals in command abroad, empowering them to convene general¹ and district or garrison² courts martial, and to delegate these powers to any other officers having a command of the body of the forces; also to appoint provost marshals and a judge advocate at any court martial, in the event of there not being one appointed by Her Majesty, or deputed by the judge advocate general, and in India and China to delegate these powers in respect to judge advocates and provost marshals.³

Warrants for convening courts martial abroad,

7. Each year there are also issued to the general or other officers commanding districts at home, and to the governor or officer commanding for the time being at Guernsey and Jersey, warrants to convene general courts martial,⁴ but not to delegate that power, nor to appoint a judge advocate, and

at home:

(7) Mut. Act, sec. 12. Art. War, 110.

(2) Appendix IV.

(8) Tytler, Essay on Military Law (by James), p. 7.

(3) Appendix II.

(1) Appendix II. III.

(4) Appendix I.

also warrants, to convene district or garrison⁷ courts martial, and to delegate this power under certain restrictions.

on special
occasions:

8. On particular occasions, special warrants issue under the sign manual for the trial of persons named in the warrant, and on charges therein recited.

under former
act, continue
in force under
existing act.

9. Warrants for holding courts martial under a former mutiny act remain in force under the existing mutiny act; and proceedings of any court martial upon any trial, begun under the authority of a former act, are not discontinued by the expiration of the same.¹ This provision was introduced into the mutiny act in consequence of a circumstance which occurred in 1760, on the trial of Lord George Sackville, when, the mutiny act expiring during the trial, and a new warrant being thereupon issued, it was deemed necessary, on the opinion of the attorney and solicitor general, that the proceedings should commence *de novo*, the court and witnesses being sworn again.²

Warrants
extend beyond
the limits of
command,

10. The operation of the warrant formerly addressed to an officer in command, was, by the terms of it, restricted to *the limits of the command*: a special warrant under the sign manual was therefore indispensable to the assembling of a general court martial for the trial of an officer or soldier, charged with an offence committed within the precincts of a command distinct from that to which the accused may have been removed subsequent to the offence. A court, the proceedings of which were approved by the King, declined to enter into the examination of a charge, upon the express grounds that it appeared to have arisen out of the limits of the command of the general who convened it:³ but the restrictive clause in the warrants was omitted in the year 1830, and the mutiny act was altered to correspond in 1834. It now declares⁴ that a person subject to it, who shall in any part of Her Majesty's dominions or elsewhere commit any of the offences for which he may be liable to be tried by courts martial, by virtue of the mutiny act, or articles of war, may be tried and punished for the same in any part of Her Majesty's dominions or elsewhere, where he may have come or be after the commission of the offence, as if the offence

whether it be
abroad or at
home; but

(7) Appendix IV.

(1) Mut. Act, sec. 97.

(2) Printed Trial, p. 213.

(3) Court martial on Lieutenant John Read, September 1790.

(4) Sec. 6.

had been committed where such trial shall take place. It must be particularly observed, that an offence committed in foreign parts, if the offender be tried within the United Kingdom or the British Isles, can only be visited by punishment extending to life or limb or by penal servitude, when such punishments may be assigned to the offence if committed at home.⁵

punishment
limited at home.

11. Except in India, no officer can assemble either a general or a district or garrison court martial for the trial of any officer or soldier of Her Majesty's forces, unless he is in possession of a warrant by Her Majesty's authority, either direct or delegated, for that express purpose. In consequence of the conflicting opinions which had been given in that country, respecting the authority by which courts martial could be appointed and convened, and the sentences confirmed, an act of parliament was passed in 1844, which, extending only to the East Indies, enacts that an offender, whether belonging to the Queen's troops, or to the [then] company's European or native troops, may be tried by a court martial, appointed or convened by any officer under whose actual command he may be serving, or within the local limits of whose command he may come, without reference to the authority from which that officer derives his power of convening courts martial; provided only that he *has* lawful authority to convene courts martial for the trial of *any* of the troops under his command.

Warrants must
be specific and
by the Queen,
except in India,

where, if granted
for any portion
of the army in
that country,

they are ex-
tended to the
whole, by

stat. 7 Vict. c.
18, or "Courts
Martial Act."

12. Courts martial must be composed exclusively of "commissioned officers."⁶ All commissioned officers of the army, on full pay; all officers on the general staff of the army, in the receipt of full pay on the staff, though on the half pay of their regimental rank; and all officers holding

Courts martial
composed of
commissioned
officers,

under certain
restrictions,

(5) Mut. Act, sec. 1. See § 38, 39.

(6) In the reign of James II. no officer below the rank of captain was eligible as a member, so long as seven officers, the number requisite to form a court martial, could be brought together.* It appears, that at this time, the governor or colonel was president, and that the court consisted of the captains in the regiment or garrison,

in which the court was held. Courts martial, held under the first mutiny act, were composed of thirteen officers, "whereof none under the degree of captain" (1 Will. & Mary, c. 5, s. 4), but this in the following mutiny act (1 Will. & Mary, ses. 2, c. 4, s. 3) became "whereof none under the degree of commission officers," and the law has not been again altered.

* English Military Discipline, printed by especial command for the use of His Majesty's forces (1686), p. 271.

as to staff officers of pensioners	rank in the army by brevet, even if on the half pay of their regimental rank, are eligible as members of courts martial. Staff officers of pensioners are not to be called upon except in case of emergency, and not in any case whatever in which it would interfere with their pay days or musters. ⁷
and non-combatants.	Paymasters are specially exempt from regimental duty, although having rank in the army, and are prohibited from assuming any military command; ⁸ instances however may be
Regimental staff.	quoted, where paymasters and also surgeons, assistant surgeons, and quarter masters have been required to perform this duty; but the custom and convenience of the service forbid recourse being had to these regimental staff officers, except in urgent circumstances, notwithstanding that, in the performance of their duties, these officers "become acquainted with the rules that apply to military subordination and discipline."
Commissaries.	Commissariat officers, having the Queen's commission, are within the terms of the mutiny act, but it is obvious "from the nature of their avocations," that notwithstanding their liability to this duty, they should never be summoned to perform it "except in extreme cases." ⁹
Numbers,	13. The number of commissioned officers required for courts martial varies with each denomination, and according to the part of the world in which they may be assembled.
minimum fixed,	14. The minimum in each case appointed is absolute, except for regimental and detachment courts martial, when the impracticability of assembling this number is a sufficient reason for diminishing it. A number exceeding that strictly required is usually sworn in on general courts martial, to guard against the contingencies which may arise from death and sickness; and generally an odd number is preferred, but this is by no means necessary, nor does it seem particularly desirable.
often exceeded.	15. Of this number one is styled president. He is nominated either by the warrant or by the appointment in orders of the authority convening the court, and is necessarily the senior combatant officer, although officers of the regimental staff or civil departments of higher relative rank may be members of the court. ¹
President,	

(7) Circ. Mem., Horse Guards, 9th March, 1844.

(8) Explanatory directions for paymasters, War Office, 1st July, 1848, p. 8.

(9) Treasury letter, No. 754, 22nd December, 1840.

(1) Queen's Reg. p. 5. Circular, Horse Guards, February 1858.

16. The president can in no case be the confirming officer, nor the officer whose duty it has been to investigate the charges on which the prisoner is arraigned; but in the case of a detachment general court martial, the convening officer may be the president.

President how disqualified, except on a general detachment court martial.

17. The articles of war also require that in the case of a general court martial, or of a district court martial for the trial of a warrant officer, the president shall not be under the degree of a field officer, unless a field officer shall not be had; nor in any case whatever under the degree of a captain, save in the case of a detachment general court martial, or a regimental or detachment court martial held on the line of march, or on board any ship, not in commission, or at any place where a captain cannot be had.³ The Queen's regulations moreover direct that, whenever general officers or colonels are available as presidents of a general court martial, no officer of inferior rank is to be placed on that duty.³

Rank of president.

18. The rank also of the other members is in certain cases dependent on that of the prisoners to be tried: no field officer can be tried by any person under the rank of captain;⁴ and at the trial of a warrant officer by a district court martial, no more than two of the members can be under the rank of captain.⁵ In addition to these provisions by the articles of war, the Queen's regulations⁶ most distinctly lay down that no officer, "in any case where it can possibly be avoided, is to be appointed a member if he belong to a class inferior to that in which the prisoner is serving: this regulation recognizes three classes of officers in the army; viz. 1st, general officers of all ranks; 2nd, field officers, including colonels; 3rd, company officers, comprehending captains and subalterns."

Rank of other members on the trial of field officer, warrant officer.

For the trial of all officers to be composed of officers of the same class;

19. "In every case where such a court can be assembled without serious embarrassment or inconvenience to the service, the members ought to be of equal, if not superior, rank to the prisoner; and in no case but one of absolute necessity is a colonel to sit upon the trial of a general officer; or a captain on that of a field officer; or a subaltern officer on that of a captain: and on the trial of subaltern

and to be of equal, if not of superior, rank, when practicable:

(2) Art. War, 117.

(3) Queen's Reg. p. 221.

(4) Art. War, 109.

(5) Art. War, 114.

(6) Page 221.

officers, two officers of that rank are considered a sufficient proportion to be placed as members of the court. Of course there can be no objection to the members of the court being of any rank superior to that of the prisoner."

Commanding officers to be tried by officers who have held commands.

20. "In cases in which it becomes necessary to bring the commanding officer of a regiment or battalion, or of a dépôt to trial, care must be taken that as many members of the court as possible shall be officers who have themselves held, or who are holding, commands."

Detail of officers for court martial duty.

21. The duty of courts martial, as of all other duties, is by roster. The Queen's regulations point out the order in which this duty is to be detailed, after that of guards and picquets,⁷ and as Her Majesty therein directs that "the tour of duty shall be from the senior downwards," it precludes the possibility, without a glaring breach of the express orders of the sovereign, of selecting or packing a court martial; or rather, it is a means of anticipating or excluding animadversions and insinuations, having a tendency to impeach the composition of courts martial.

Officers of the army, or Indian service, or marines, may be associated on courts martial.

22. Where it is necessary or expedient, a court martial, composed exclusively of officers of the army, or of officers of the Indian army, or of officers of both those services, or of either or both together with officers of the Royal Marines, whether the commanding officer by whose order such court martial is assembled belongs to the land or marine forces, may try a person belonging to any of these three services.⁸

Officers of regulars and militia cannot be associated on courts martial,

except colonial militia in time of actual invasion or under martial law.

23. Officers of the regular forces and of the militia cannot be associated together on courts martial, and are reciprocally ineligible for the trial of an officer or soldier in either service;⁹ this, however, has not been held to prevent the association, on courts martial, of officers of regulars, and of militia or other forces actually embodied and doing duty in the colonies in time of actual invasion, or under martial law,¹ but for the trial, by these mixed tribunals, of civilians and insurgents or officers and soldiers of the local force only, and not of any person belonging to the regular army.

(7) Queen's Reg. p. 1.

(8) Art. War, 148.

(9) Art. War, 137; but see note, § 58.

(1) A well-known instance is supplied by the trial of John Smith, a missionary in Demerara, in 1822. A

similar practice was expressly provided for by the acts of parliament for the trial by courts martial of offenders in Ireland subsequently to the rebellion in 1798.

24. Regimental courts martial are in all cases composed of officers of the corps in which they may be held. Other courts martial, excepting only when a district court martial is held for the trial of a warrant officer,² may be composed of officers of any corps, but the articles of war contain special provisions as to the mixture of officers in several special cases.

Special provisions as to mixture of officers.

25. Officers and soldiers of the life and horse guards, for differences arising purely among themselves, or for crimes relating to discipline or breach of orders, are tried by officers serving in any or all of those corps.³

Association of officers on courts martial in the household brigade;

26. Officers of the regiments of foot guards, for similar purposes, form courts martial,⁴ and take rank according to the dates of their regimental commissions.⁵

in the three regiments of foot guards;

27. Courts martial, arising out of disputes between different corps, whether of the household troops or of the other forces, are composed, in equal proportions, of officers belonging to the corps in which the parties complaining and complained of do then serve, the president being taken by turns as nearly as the convenience of the service may admit, and in the order of the seniority of the corps concerned.⁶

when different corps are interested;

28. When any proportion of the household brigade or the guards are detached, courts martial for the trial of officers and soldiers of these corps may be composed of officers of different corps; but at least one half of the officers composing the court must be taken from the corps to which the prisoner may belong, if so many can be conveniently assembled.⁷

when the household troops are on detached duty.

29. Officers of artillery for differences arising amongst themselves, or in matters relating solely to their own corps, have courts martial composed of their own officers; but when a sufficient number of such officers cannot be assembled, or in matters wherein other corps are interested, the courts are composed of officers of artillery and of other corps indifferently.⁸

Courts martial in the artillery.

(2) Art. War, 114.

(3) Art. War, 149.

(4) *Ibid.*

(5) Art. War, 184.

(6) Art. War, 150.

(7) Art. War, 151.

(8) Art. War, 152.

CHAPTER II.

JURISDICTION OF COURTS MARTIAL.

Jurisdiction.	30. THE ordinary jurisdiction of courts martial is restricted to the cognizance of offences declared by, or under, the powers of the mutiny act; committed either at home or abroad, within the time specially limited by the legislature, by persons who were then subject to the mutiny act. The penalties, however, depend on the place where, and the rank of the person by whom, the offences may have been committed, and vary also according to the powers of the court by which they may be adjudicated.
Specific for trial of offences affecting discipline,	
and for judicial enquiries.	31. Courts martial are also available for the purpose of enquiring into matters which may be brought before them, although no prisoner may be on his trial. ¹
Concurrent with civil judicature;	32. Their ordinary jurisdiction is not only for the trial of strictly military offences, of which the civil judicature does not take cognizance, but it is also, to a certain extent, concurrent with that of the ordinary criminal courts. Inasmuch, however, as every officer or soldier accused of felony or other misdemeanor, (other than those mentioned in the mutiny act, ²) is liable, on application being made for that purpose, to be delivered over to the civil magistrate, this concurrent jurisdiction of courts martial is wholly subordinate to that of the civil courts, with the one exception created by the mutiny act, ³ where the trial of an attested recruit in some cases may be either before two justices or before a court martial, "at the discretion of the military authorities."
subordinate, or	
at the option of military authority,	
but extended to treason and all offences against known laws of the land;	33. The ordinary jurisdiction of courts martial is enlarged beyond the seas, in default of a competent civil judicature,* and then extends to the exclusive trial of military persons for civil offences, for which, with the exceptions expressly

(1) Art. War, 13, 115, 149, 150,
152, 174. See § 317.

(2) Mut. Act, sec. 40, 76.
(3) Mut. Act, sec. 48.

declared or recognized by the mutiny act, they are not otherwise amenable to courts martial,⁴ except in so far as not being capital crimes they are to the prejudice of good order and military discipline; or else, in the case of an officer, involve "*scandalous* behaviour unbecoming the character of an officer and a gentleman," or, in the case of a soldier, constitute "a charge of disgraceful conduct."

Jurisdiction of
courts martial

34. In the field all followers and retainers of the army become subject to the restraint of military law; and the custom of war and the necessity of the case then also justifies the punishment, by sentence of court martial, of certain crimes against the safety of the army, or the person or the property of individuals belonging to it or entitled to its protection, when the offenders themselves neither belong to nor are connected with the service.

Is enlarged in
the field.

Followers.

Aliens.

35. The declaration of martial law renders all persons amenable to courts martial, on the order of the military authority, so long as the civil judicature is not in force. There is also a modified exercise of martial law when, by special intervention of the authority exercising the legislative⁵

Is paramount,
superseding
all civil
process, during
martial law,

or concurrent,
by a special
law or ordinance.

(4) Officers and soldiers acquitted or convicted by the civil magistrate or by the verdict of a jury, are not (Mut. Act, sec. 39) liable to be tried for the same crime or offence by a court martial; officers were liable under the mutiny act of 1846 and previous years, but not to be punished otherwise than by *cashiering*.

The want of power to reduce by court martial, a non-commissioned officer who may commit an offence, rendering him wholly unfit for his situation, and who, after undergoing the sentence of the civil power, may be returned to his regiment, and continue to retain his rank, pending a reference to the colonel or the commander-in-chief, is felt as a practical inconvenience on a distant station.

No opinion is offered as to whether it might or might not have been advantageous to retain the power of having recourse to a court martial to award the punishment of cashiering, in those cases where the honour of the army might be affected; but it may be observed that the mutiny act, as it now stands, seems to restrict Her Majesty to the one alternative of cashiering, in those cases where she

may see fit to remove any officer from the service for an offence, which may have been disposed of by the civil power. Nor is this limitation affected by the twenty-fifth section, which applies only the commutation of "a sentence of cashiering."

(5) As instances of special laws creating this exceptional jurisdiction, may be mentioned the statute [Ir.] 39 Geo. 3, c. 11, passed in Ireland in 1798, which was revived by the Irish act, 40 Geo. 3, c. 2, and further continued by 41 Geo. 3, c. 14 [U. K.]; the statute 43 Geo. 3 c. 117, which was passed in the Imperial Parliament in 1803, re-enacting the principal provisions of that before mentioned; and the Ordinance [Canada], 2 Vict. c. 3, passed in Canada in 1838. These acts authorize the exercise of the powers which they confer on the executive "whether the ordinary courts shall or shall not be open," and do not lay down any deviation from the ordinary manner of proceeding in the case of courts martial held under them. The Irish Coercion Act, passed in 1833 (3 & 4 Will. 4, c. 4), regulated the rank of the members, the punishments to be awarded, and, among other peculiar

power, courts martial have been erected into tribunals for the trial of persons, not subject to military law, for certain specified offences, although the ordinary course of law may have been partially restored or had never been altogether stayed.

Martial law unconstitutional in time of peace,

but the acknowledged prerogative of the sovereign in case of necessity.

36. The preamble of each successive mutiny act reasserts the illegality of martial law in time of peace, by reciting from the Petition of Right that no man can be forejudged of life or limb, or subjected in time of *peace* to any kind of punishment within this realm by martial law. Indirectly therefore it recognizes the legality of resorting to this expedient in time of war and intestine commotion. No legal dogma can be clearer, and being each year recognized by parliament, it is entitled to all the deference which may be due to an act of the legislature so repeatedly revised and considered. The legal right, or, more properly, the power of the sovereign or the representative of majesty, to proclaim martial law, has been fully set forth in many statutes, and the acknowledged prerogative of the crown to resort to the exercise of martial law against open enemies or traitors is expressly declared in several earlier statutes, and also, among others more recent, in the Irish disturbance act⁶ of 1833. It is not, however, here necessary to descant on Her Majesty's undoubted prerogative to punish rebels or other enemies in arms against her, though within the realm, by the aid of courts martial; the object in this place is to ascertain that part of martial law only which is commonly designated the law military.

SPECIFIC jurisdiction

as to offences.

The mutiny act empowers Her Majesty to

37. The mutiny act (sec. 1) recites, that no man can be forejudged of life or limb, or subject, *in time of peace*, to any kind of punishment within the realm, by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm; but nevertheless, for the preservation of discipline and the more prompt punishment of offences to the prejudice of good order and military discipline than the usual forms of the law will allow, it provides for the cognizance of crime in the army, by empowering Her Majesty to establish articles of war for

enactments, provided (sec. 14) that the parties before the court might have

the assistance of counsel and attorneys.
(6) 3 & 4 Will. 4, c. 4, s. 40.

the government of her forces, which articles are to be judicially noticed by all judges, and in all courts whatsoever.

make articles of war.

38. The penalties to be declared by such articles are however limited, since no persons within the United Kingdom of Great Britain and Ireland, and the British Isles, are subjected by them "to suffer any punishment extending to life or limb, to be kept in penal servitude for any crime which is not expressly made liable to such punishments by the mutiny act," nor in any manner, nor under any regulation, which does not accord with its provisions.⁷

Offences punishable within the United Kingdom capitally or by penal servitude restricted to those expressed to be so punishable by the mutiny act.

39. It may be observed that this limitation, by its express terms, does not affect Her Majesty's prerogative, whilst legislating for her armies in foreign parts; neither does it operate within the United Kingdom in time of foreign invasion or civil war; which is evinced by the fifty-seventh and three following articles of war, for not only is the penalty of death thereby annexed to crimes (not expressed in the mutiny act) which may be committed in the United Kingdom; but it is also apparent that it is intended to apply within the realm, because the limitation as to foreign parts applies only to the sixty-second article. In fact, the limitation by the mutiny act of the power of the sovereign to declare crimes punishable by death within the United Kingdom, under any circumstances, is but nominal, as it⁸ expressly declares, that to disobey the lawful command of a superior officer is punishable by death, and that — whether the offence be committed

Such restriction does not extend without the realm,

nor within it, in time of invasion or civil war,

and at other times is nominal, rather than real, disobedience being punishable by death.

(7) Mut. Act, sec. 1. Sec. 14 specifies the offences punishable by death, and by sec. 17 embezzlement is made liable to penal servitude.

The terms of the provision quoted in the text (sec. 7), and those of sec. 15, "shall suffer death, or such other punishment as by a court martial shall be awarded," still remain as in 1859 and previous years. Until the mutiny act was remodelled in 1860, sec. 21 (now sec. 15) enabled a court martial, "by which any soldier shall have been tried and convicted of any offence punishable with death," whenever the offence was not thought "deserving of capital punishment," to award penal servitude; but as this was then omitted, and inasmuch as sentences of

penal servitude continue to be awarded as heretofore, the terms of sec. 6, quoted above, "such other punishment," and the express mention of penal servitude in sec. 8, which enacts the powers of general courts martial, may be inferred to be sufficient for the commutation, by a court martial, of death for penal servitude in the case of any offender. There cannot, however, be any doubt but that the express mention of 'penal servitude' as a punishment in sec. 6 would have this effect less circuitously. In the case of trials for civil offences, courts martial are still expressly authorized to commute a sentence of death to penal servitude by articles 145, 146, and 147.

(8) Sec. 15.

within the realm, or in any other of Her Majesty's dominions, or in foreign parts, upon the land or upon the sea.

Courts martial may try offences, wherever committed,

but they ought to be investigated where they occur.

4C. Subject to this limitation of capital punishment as to the crimes expressly made liable thereto by the mutiny act, courts martial, wherever held, may legally take cognizance of offences without reference to the place of their commission, at home or abroad, on land or upon the sea.⁹ But by the Queen's regulations of the army, general, or other officers, commanding on foreign stations, are restricted from sending home officers or men, with articles of accusation pending against them, except in cases of the most urgent necessity, "it being essential towards the due administration of justice, that when charges are preferred, they should be thoroughly investigated on the spot."¹⁰

If tried elsewhere, they are punished as if committed where the trial takes place.

4I. The mutiny act renders offences against it, or the articles of war, committed in any of Her Majesty's dominions,¹ or elsewhere, triable and punishable by courts martial in any part of Her Majesty's dominions, or elsewhere, 'as if the offence had been committed where such trial shall take place.' When first introduced into the mutiny act, the provision was to the effect, that an 'officer or soldier committing an offence beyond sea, and coming within the realm, should be punished for the same *only as if committed within the realm*;' and it was then held contrary to law to send a prisoner for trial out of the realm. The proviso in the first clause of the existing mutiny act, and that in the hundred and ninetieth article of war, as altered in the year 1851, are the same in effect: an officer or soldier, on foreign service, may commit an offence not specified in the mutiny act, for which, if tried abroad, he would, by the operation of the articles of war, be liable to the punishment of death; whereas, if tried for the same at home, death could not be awarded — a distinction in perfect unison with the ordinary discrimination of British law, and productive of no inconvenience or incongruity.²

(9) Mut. Act, sec. 15.

(10) Queen's Reg. p. 220.

(1) Mut. Act, sec. 7.

(2) What would be the effect of this clause of the mutiny act, when applied to a civil officer employed in the war department in the British Isles or at a foreign station? Such persons, employed in the United

Kingdom, are not subject to the provisions of the mutiny act; if, therefore, such civil officer in the British Isles, or at a foreign station, commit an offence for which he is liable to be tried by a court martial, and be brought home with the charge pending, he would doubtless, from the express words of the clause, be subject to

It may be observed, that the terms of the proviso, as now worded (whatever may be the intention) would seem to subject an offender, who, *within the United Kingdom*, may commit an offence not specified in the *Mutiny Act*, and who may be tried abroad, to the capital punishments declared only by the articles of war.

42. Courts martial, however, although the mutiny act and articles of war prescribe no limit to their jurisdiction as to place, except in respect to their powers in awarding punishment, are restricted as to the place of sitting. The hundred and sixteenth article of war, implicitly excepts ships "in commission" so far as concerns detachment courts martial; and the Queen's regulations have, since 1844, laid down in express terms that "no military court martial is ever to be held on board any of Her Majesty's ships in commission."³

The holding of general or other courts martial on board ships in commission is forbidden.

43. Recent legislation has made a radical alteration in the statutory right of officers and soldiers to be tried under the powers of the mutiny act in respect to their conduct on board ships of war,—a change in the legal position of the army, the most signal since the passing of the first Mutiny Act in 1689, although it does not appear to have given rise to any discussion in either house of parliament. The "Naval Discipline Act," 1861 (23 & 24 Vict. c. 123), sec. 78, enacts "Her Majesty's land forces, when embarked on board any "ships, shall be subject to the provisions of this act, to such

The land forces subjected to naval discipline.

trial by a court martial, but could only be punished as if his offence had been committed "where such trial shall take place." Now, the same act, which, if committed by a civil officer out of the United Kingdom, would amount to an offence cognizable by a court martial, is, with reference to the jurisdiction of such courts, no offence, if committed by the civil officer within it; and hence arises a case, unimportant as it may be, not provided for by military law. A court martial is placed, by the legislature, in the strange predicament of being authorized to try, but incapacitated from awarding punishment.

(3) Queen's Reg. p. 343. An order by the Duke of York, of the 19th April, 1800, had made known to the army

that "the holding of general or regimental courts martial on board His Majesty's ships of war is contrary to the rules and discipline of the navy, and is on no account to be practised." This order was occasioned by a representation from the Admiralty that Lieut.-Col. Talbot, commanding 2nd Battalion, 5th Foot, had broke a sergeant by regimental court martial on board H.M.S. Niger, in Turbay, contrary to the opinion of her captain.

Regimental courts martial had, up to that time, been very generally held on board men of war by allowance of individual captains; and there are examples of officers and soldiers being tried, and of the award of capital sentences by general courts martial, on board men of war.

The land forces
subjected to
naval discipline,

" extent, and under such regulations, as Her Majesty, her
" heirs and successors, by any order or orders in council, shall
" at any time or times direct."

under regula-
tions framed by
the Admiralty.

44. " The regulations and instructions for the govern-
ment of Her Majesty's naval service," " established by Her
Majesty's order in council," were issued to the navy by the
Lords of the Admiralty under date the 6th of August, 1861.
They have not been published to the army, and are not
easily accessible to military men, but are here given *in*
extenso, as having such an important bearing on the subject
of this work.

The land forces
when serving
as marines
placed on the
same footing as
the marine
forces, when
borne on the
books of Her
Majesty's ships.

45. The chapter (XV.) headed " Her Majesty's Land
Forces," contains two sections, as follows : — " § I.—WHEN
" EMBARKED TO SERVE AS MARINES. 1. When any of Her
" Majesty's land forces shall be embarked in the fleet to
" serve as marines, they shall be considered, in every respect
" whatsoever, as royal marines, except only as to pay, cloth-
" ing, and stoppages, which will be governed by the regu-
" lations of the army."

Land forces
embarked for
passages
conform to naval
regulations.

46. " § II.—WHEN EMBARKED FOR PASSAGES. 1.
" Whenever any of Her Majesty's land forces, or any royal
" marines formed into a separate corps or battalion, shall be
" embarked as passengers in any of Her Majesty's ships, all
" the officers and soldiers shall, from the time of embarkation,
" strictly conform themselves to the laws and regulations
" established for the government and discipline of Her
" Majesty's navy; and shall consider themselves, for these
" purposes, as under the command of the senior officer of
" the ship, as well as of the superior officer of the squadron,
" if any, to which such ship may belong."⁴

Offences against
the discipline
of the ship.

47. " In case any officer, non-commissioned officer, or
" soldier shall be guilty of any offence against the laws and
" regulations established for the government and discipline of
" the ship in which he is embarked, the commanding officer of
" such ship may, by his own authority, and without reference
" to any other person, cause him to be put under arrest, or to be
" confined as a close prisoner, if the circumstances of the case
" and naval discipline require it; and may detain him (if ne-
" cessary) in either of those situations, during his continuance

(4) See Art. War, 193.

"on board; transmitting, without delay, a report in writing, of the charges against such officer or soldier, to his superior officer, or if there be no senior officer present, to the commander in chief of the land forces, in order that he may be disembarked, or removed into a transport the first convenient opportunity, and then proceeded against according to military law, if his offence be cognizable at a general or regimental court martial."

48. "3. In cases where the practice of the navy authorizes immediate punishment,⁵ private soldiers (but no others) are to suffer such punishment as the commanding officer of the ship may think fit to be inflicted; provided the commanding officer of the troops shall previously concur in the necessity of such immediate punishment; but if the latter shall differ in opinion thereupon, (the reasons for which difference of opinion he shall state in writing, and deliver to the commanding officer of the ship,) the delinquents are, on the first opportunity, to be disembarked or removed into a transport, and to be proceeded against as stated in the preceding article."

Case of mutiny;

49. "4. No military court martial, whether general or regimental, shall be held on board any of Her Majesty's ships in commission."

Courts martial not held on board

"5. Should any officer or soldier, while embarked in one of Her Majesty's ships or vessels, commit any military offence for which he would be amenable to a court martial, if serving on shore, requisition is to be made by his commanding officer to the commanding officer of the ship, who will, thereupon, cause such officer or soldier to be put under arrest or confinement until he can be removed in the manner above mentioned, to be brought to trial."

for trial of military offences.

50. The naval regulations⁶ direct officers in command of troop ships "to leave the troops to the management of their own officers, as far as may be consistently allowed; but no military court martial is to be held on board; nor is any

Maintenance of discipline in troop ships.

(5) No corporal punishment "is, even in extreme cases, to exceed forty-eight lashes, or to take place until twelve hours at least shall have elapsed after the completion of the warrant, except in cases of mutiny, when the immediate punishment of the offender

may be deemed by the officer having the command to be requisite, without any preliminary investigation on the part of other officers,"—*Naval Regulations* (1861), p. 124.

(6) Chap. xxi. l. p. 180.

corporal punishment to be inflicted except under his own authority and order," in which he is to be guided by the instructions given above. (§ 47.)

The contingency of land forces serving as marines is not provided for expressly in the regulations for the army.

51. It will be observed on reference to the Queen's regulations under the head "Duties on board of ship," that they are practically the same as the naval regulations for troops embarked for passages,⁷ but neither they, nor the hundred and ninety-third article of war, *expressly* provide for the case of land forces embarked to do duty.⁸ Should the exigence of Her Majesty's service at any time again require it, it is to be hoped that this measure would be divested of practical inconvenience by the good feeling and mutual endeavours of officers of the navy and army to promote the good of the service, and the welfare of their common country and of their sovereign, by a hearty and cordial concurrence on all points of duty.⁹

Limitation as to time, for trial of offences against former mutiny acts under existing act.

52. It is enacted by the ninety-seventh section of the mutiny act, that offences against former mutiny acts and articles of war, may be tried and punished as if they had been committed against the present mutiny act. But "no person" is liable to be tried or punished for any such offence, which shall appear to have been committed more than three years before the date of the warrant for such trial "unless

(7) Queen's Reg. p. 343, 344.

(8) The Royal warrant (Pay and Allowances), 1st July, 1848, par. 11, makes the following provision: "Soldiers serving on board ships as marines shall not be subject to any deduction for rations."

(9) The law having been altered (sec. 43), and in a sense so entirely different from the construction which had been placed upon the previously existing statutes by the military authorities, it would serve to no purpose to reproduce the arguments by which the author supported his opinion, that offences against discipline, committed on board ships of war, by officers and soldiers of the land forces, could be tried only under the mutiny act and articles of war by a military court martial.

The reader, to whom the question may still possess an interest, is referred to the fourth edition of this work (pp. 100-117), and will not be displeased to be directed to an opinion by the law officers of the crown, upon a case

referred to them by the Duke of York, arising out of the dismissal by a naval court martial of Lieutenant Gerald Fitzgerald, of the 11th Foot, which was quoted in Sir John Barrow's "Life of Admiral Lord Howe" (pp. 307-308), subsequently to the appearance of the author's observations, and which is entirely to the same purport.

Lieutenant Fitzgerald was embarked with a part of his regiment to serve as marines, and was tried before a naval court martial, held on board H.M.S. Princess Royal, in San Fiorenzo Bay, Corsica, on the 3rd July, 1795, "for having behaved with contempt" to the captain of the ship on board of which he was serving, and, respectfully declining to enter upon any defence, was sentenced to be dismissed His Majesty's service. He was reinstated at the instance of the Duke of York, who denied the right of a naval court martial to try an officer of the army.—See Barrow's *Life of Lord Howe* (1838), pp. 304-308, *McArthur on Courts Martial* (1813), vol. i. pp. 202, 406-411.

the person accused from having absented himself or other manifest impediment, has not been amenable to justice within that period" when it is extended to any time not exceeding two years after the impediment has ceased.¹⁰

53. Subject to this limitation as to time, and by virtue of Her Majesty's power¹¹ of bringing offenders against the mutiny act and articles of war to justice, the jurisdiction of courts martial extends to every case where charges are exhibited against persons to whom the provisions of the mutiny act are applicable at the date of the offence, and this, it will be observed, whether they have continued in actual service or have ceased to be amenable to military law.

Offenders
against mili-
tary law,
whether in or
out of the
service,

54. This was clearly established by the celebrated trial of Lord George Sackville for his conduct at the battle of Minden. It appears, from the case referred to the attorney and solicitor general, that on his return from Germany, Lord George, in a letter dated the 7th September, 1759, "humbly requested His Majesty to give him an opportunity of justifying himself before a court martial to be appointed for the purpose of giving judgment on his conduct." But the King (George II.) "on the 10th of September was pleased to dismiss Lord George Sackville from his service as Lieutenant General and Colonel of Dragoon Guards." 'His Lordship having no other place or office in the army besides those above-mentioned, and being totally removed from all military employment, repeated his request for a court martial, to which His Majesty was pleased to consent if it might be according to law.' 'Upon the question "Whether an officer is triable by a court martial for a military offence, after having been dismissed from all His Majesty's employments" the above-mentioned law officers to whom the case was referred stated that they were "of opinion that an officer guilty of offence against martial law, while he is in actual service and pay, may be tried by court martial after having been dismissed from all his military employments."'¹²

continue amen-
able to justice,
as in the case of
Lord George
Sackville, who

(10) In the case of enrolled pensioners, &c., &c., no longer on duty, this period is further limited to 'twelve calendar months after the offence shall have been committed, or the offender shall have been apprehended.'—6 & 7 Vict. c. 95, s. 6.

(11) Mut. Act, sec. 6, where, not

"persons subject to this act," as in sec. 15, of persons who may commit crimes, but "offenders against this act and the articles of war."

(12) Signed 'C. PRATT, C. YORKE, Lincoln's Inn Fields, 12th January, 1760.'—State Paper Office. Domestic. Geo. II. No. 185.

was brought
to trial, and,

the opinion
of the twelve
judges having
been obtained,

was sentenced
by the court
martial.

Case of an officer
tried when on
half-pay.

55. Upon this Lord George Sackville was brought to trial before a general court martial held at the Horse Guards on the 27th February, 1760, under a special warrant dated the 26th January, but, the president having been taken ill, a new warrant was issued on the 6th March, and on the following day the court assembled and proceeded with the trial. In the interval, however, by the King's command, signified by a letter from the lord keeper, the following question was referred to the judges, "whether an officer of the army having been dismissed from His Majesty's service, and having no military employment, is triable by a court martial for a military offence lately committed by him while in actual service and pay," upon which they informed His Majesty in reply, that they "have taken the same into consideration, and see no ground to doubt of the legality of the jurisdiction of a court martial in the case put by the above question."¹

56. Lord George Sackville was eventually found guilty of disobedience of orders, and adjudged by the court to be "unfit to serve His Majesty in any military capacity whatever." George II. hereupon issued a very severe order making known this sentence² to the army, and with his own hand erased his name from the roll of privy councillors.

57. In connection with this subject it may also be remarked that Lieutenant James Blake, when on half-pay, was tried by a general court martial assembled on the 30th May, 1805, for offences committed when on full pay,³ and was sentenced to be cashiered, which sentence was approved by the King and carried into effect: he was described in the charge as *on half-pay* of the York Rangers, and late of the 2nd battalion 44th regiment of foot. It may be right to observe, that 'previous to arraignment, the prisoner informed the court, that it never having been notified to him as having been put on the half-pay of the York Rangers, he still conceived himself a lieutenant in the 2nd battalion 44th regiment, and acknowledged himself subject to martial law.'⁴ The con-

(1) Extract — Letter dated 3rd March, 1760, signed by the then judges.

(2) It was intimated to Lord George, before the trial was ordered, that if the sentence were death, it should be carried into execution, which, after the recent example of Admiral Byng, he

had little reason to doubt.

(3) The offences of which Lieut. Blake was found guilty, were committed on the 11th May, and his exchange to half-pay was dated 16th May.

(4) Manuscript copy of the proceedings of the trial.

currence or acquiescence of the prisoner, could not, it is conceived, affect the law of the question, or the jurisdiction of the court; an individual, if not answerable before it according to law, could not, by any effort, bring himself within its influence.

The competence of the court independent of any act of an offender before it.

58. The persons who in time of peace are amenable to military law, and in a position to commit offences cognizable by courts martial, are those only who are subject to the mutiny act. Formerly the mutiny act in general terms provided for the case of officers and soldiers, and by a declaratory enactment further particularized certain persons as within its intent and meaning. At present, and since 1847, the persons, who are subject to the act, are specified in the second section, which enacts that *all* the provisions of the act shall apply to *all* persons who are or shall be commissioned or in pay as an officer, or who are or shall be listed or in pay as a non-commissioned officer or soldier; to all persons employed in the recruiting service, receiving pay, and all pensioners receiving allowances in respect of such service, and to the officers and soldiers belonging to Her Majesty's Indian forces, whilst in the United Kingdom; to persons hired to be employed in the royal artillery, royal engineers, and military store department, and to master gunners, and conductors of stores; to the corps of royal military surveyors and draftsmen; to all officers and persons serving on the commissariat staff, or in the commissariat staff corps, or in the military store department, and to persons in the war department who are or shall be serving with any part of Her Majesty's army at home or abroad, under the command of any commissioned officer; and (subject to the provisions of the 6 & 7 Vict. c. 95), to any out-pensioners of the Royal Hospital, Chelsea, who may be called out on duty in aid of the civil power, or for muster or inspection, or who having volunteered their services for that purpose shall be kept on duty in any fort, town, or garrison; and to all storekeepers and other civil officers employed by or under the secretary of state for war in the British Islands or at foreign stations. It will be remarked that persons in the war department, serving under the command of a commissioned officer, under which head are included artificers of different descriptions, as collar-makers, wheelers, smiths,

Jurisdiction as to persons:

officers, non-commissioned officers, and soldiers,

recruiting,

in the Indian service, artillery and engineers; ordnance and commissariat departments,

but civil officers only when their stations are out of the united kingdom,

and militiamen,
when attached
to regiments
of the line.

&c., frequently attached to the artillery and engineers, are subject to the mutiny act whether serving at home or abroad, whereas civil officers of the war department are not so subject, unless employed out of the United Kingdom. Volunteers of the regular militia, when attached to regiments of the line to qualify themselves for the permanent staff, either as serjeants or drummers, trumpeters or buglers, are "under the command of the officer commanding the regiment of the line equally with the soldiers of the regiment," and are "subject to the provisions of the mutiny act."⁵

Signification
of "commis-
sioned;"

It includes all
brevet officers,
but it is

a question
whether half-
pay officers
are included.

Half-pay officers
amenable to
arrest; but

59. Officers on half-pay were for a few years expressly mentioned in the declaratory clause, but this specification of them was afterwards omitted, and previous to the substitution of "commissioned" for "mustered" in the general description in the mutiny act of 1786, neither brevet officers nor officers on half-pay were within the terms of the act.⁶ The description, as then amended and as it now stands, unquestionably includes all officers holding brevet commissions: Mr. Tytler, in the first edition of his Essay, laid it down that it also included half-pay officers; this he altered in his revised edition,⁷ and meanwhile prefixed a "material correction" to the former, in which he states that he had been certified "that in framing the clause of the mutiny act as it now stands, by which all officers, commissioned or in pay, are declared liable to its authority, it was not the intention of the legislature to include *officers on half-pay* in that description; but that officers holding brevet commissions, without pay, were understood to be included."

60. However this may be, it is certain that under the law as it then stood, officers on half-pay, though not holding brevet rank, or employed on the staff, have been deemed liable to military arrest, otherwise than with respect to their

(5) 25 & 26 Vict. c. 80, s. 7.

(6) Tuesday 27th April, 1785, 'the court martial appointed to try General Ross, met agreeable to their adjournment, to receive the opinion of the twelve judges of England, on the point submitted to them, viz. whether General Ross, as an officer on half-pay, was subject to the tribunal of a court martial? The judges gave an unanimous opinion, that he was not, as an half-pay officer, subject to military law.

They stated their answer in two points, and in both declared it as their opinion, that neither his warrant as a general officer, nor his annuity of half-pay, rendered him obnoxious to military trial. In consequence of this, the general was discharged from the custody of the marshal, and the court broke up.'—*Annual Register*, vol. xxvii. p. 230.

(7) Essay on Military Law, p. 112.

conduct on full-pay, and consequently amenable, it might be inferred, to military law. This appears by the orders which promulgated the court martial on Lieutenant John Mahon, who was found guilty of striking Lieutenant Geagan, *half-pay* 8th West India regiment, in the mess-room of the detachment 9th foot, in the barracks at Morne Bruce, Dominica, on the night of the 3rd July, 1819, and sentenced to be discharged from His Majesty's service. He was recommended by the court, and experienced the royal clemency. The Prince Regent was at the same time pleased to command that Lieutenant Geagan should be severely reprimanded for the whole of his conduct in the different stages of this transaction, and "that his deep displeasure should be expressed at the conduct of Captain Ogle, who was president of the mess at Morne Bruce when this affair happened, as having been grossly negligent of his duty, in not interposing his authority on that occasion, by putting the *parties under immediate arrest*; thereby effectually preventing . . . the fatal consequences which might have ensued to Lieutenant Mahon and Lieutenant Geagan from their being left at large."⁸

61. The substitution of "commissioned" for "mustered," referred to above, gave rise to much discussion in both houses of parliament; and the debates may tend to show the intention with which the alteration was introduced, but they cannot decide the point of law. It does not appear that any opinion of high legal authority has subsequently been given on the question. Whatever may be the true construction of the *mutiny act*, it would seem,—so long as the incidental mention⁹ of officers on half-pay stands a part of the articles of war, as at present worded,—that the *articles* at all events must be taken to express the intention of the sovereign to confine the penalties of military law to offences committed during actual military service.¹⁰

whatever interpretation commissioned may bear,

by the articles of war half-pay officers are not amenable to military law.

62. Some members, who took part in the debate, expressed

Expediency of subjecting

(8) G. O., No. 452.

(9) Art. War, 112, in specifying the officers who may compose a district court martial. The article was first introduced in 1829, and the proviso referred to has been continued without alteration—"provided such officers" i. e., of the general staff "are in the receipt of full pay on the staff,

and are themselves *amenable to military law*, ALTHOUGH on the half-pay of their regimental rank."

(10) As to the jurisdiction of courts martial in the case of offenders who have ceased to belong to the service, or who have been placed on half-pay—See § 52-57.

officers on half-pay to military law.

an opinion, that hardship and injustice to officers on half-pay would arise by subjecting them to military law ; but when it is considered that officers on half-pay are subject to dismissal by order of the sovereign, it will be admitted that their amenability to trial must be held as an advantage, and their actual trial a boon, rather than a hardship. The Lord Chancellor Thurlow aptly remarked, during the course of this debate, " If gentlemen chose to have the advantage of military rank, they ought to hold it on the condition of being subject to military law ; and if they disliked that condition, they might ease themselves of the grievance, by resigning their commissions." The respectability of the army would certainly be promoted by the trial and consequent dismissal of every officer who conducted himself in a manner derogatory to his profession ; and, as on an officer's resumption of active duties, whether by a new commission or by a staff appointment, the commission which he retains on half-pay is that alone by which his rank in the army is ascertained, there can be no injustice, but a positive necessity, one would imagine, for rendering an officer accountable to the service for his conduct on half-pay. The exertion of the royal prerogative to dispense with the further service of an officer on half-pay is seldom resorted to but in very aggravated cases ; nor can it be wished that recourse should be had to it more frequently, since its application must always be attended by difficulty ; the delinquency of the individual being judged by reports, and not by judicial enquiry.

" Listed, or in pay," comprehends masters of bands, &c., though not listed.

63. The words " listed or in pay as a non-commissioned officer or soldier," clearly comprehend masters of bands, schoolmasters,¹ serjeant-armourers, drummers, boys, and

(1) It is no longer the custom to dispense with a regular attestation in any case; armourer serjeants are enlisted for general service. (Queen's Reg. p. 143.)

Trained " schoolmasters" are attested; but, when appointed to regiments, the usual regimental number is dispensed with in their case. (War Office, 19th April, 1850.) First-class schoolmasters receive a warrant from the secretary at war, and rank as warrant officers. (War Office Circ. 12th June, 1854.) The following extract from instructions issued by direction of His Grace the late Duke of Wellington, is inserted in the Army

School Regulations, which took effect from the 1st July, 1854 (par. 14).—" The " schoolmaster, when attested and enlisted under the provisions of the " mutiny act, is amenable to trial for all " offences against its provisions; but " considering the circumstances attending the education and position of the " schoolmaster, the commander-in-chief " desires that in any case of misconduct " in the schoolmaster, occasioning his " being placed in arrest with a view to " his trial by court martial, the facts and " circumstances of the case may be reported to the commander-in-chief for " such directions as he shall think fit to " give."

others, who, though not enlisted or attested, are in the receipt of pay as non-commissioned officers and soldiers, as was not uncommonly the case under obsolete regulations. Were this otherwise doubtful, it would be evident from the decision in the often-quoted case of Serjeant Grant, who, though *not enlisted*, but being in pay as a serjeant in the 74th regiment, and employed on the recruiting service, was brought to a general court martial at Chatham on the 21st March, 1792, found guilty of having promoted, and having been instrumental towards, the enlisting of two men in the service of the East India Company, knowing them to be deserters from the guards, and sentenced to be reduced to the ranks and to receive 1,000 lashes; and who thereupon applied to the court of common pleas, for a writ to prohibit the execution of the sentence. In remarking on the refusal of a prohibition in this case, it should be noticed, that a parallel clause to that in the second section of the present mutiny act, which expressly includes "persons employed in the recruiting service, receiving pay in respect of such service," did not then exist. It is also to be collected from the judgment of the court and the remarks of the chief-justice (Lord Loughborough), that a person once in the receipt of pay as a soldier, must serve till discharged, or till the completion of the period of his engagement: Serjeant Grant, though not enlisted, was sentenced "to serve as a *private soldier* in the ranks."

64. In carrying out the late most signal improvements in the law of enlistment, a modification of the general terms "listed or in pay" has been introduced into the mutiny act. The forty-seventh section provides that "No recruit, unless he shall have been *attested*, or shall have received pay *other than enlisting money*, shall be liable to be tried by court martial." Recruits absconding under these circumstances, are punishable as "rogues and vagabonds" by two justices of the peace.

but does not include un-attested recruits, who have not received any daily pay.

65. Mr. Tytler in some measure countenanced the opinion that peers, who are officers, are exempt from trial by courts martial, and extended the principle to members of either house of parliament, by assuming that, "as the law has not expressly warranted the suspension of parliamentary privileges in such cases, the safest course seems to be, that

Members of parliament, commissioned or in pay, liable to arrest and trial;

previously to the arrest of any member, in order to trial for a military crime, notice should be given to the house of which he is a member, with a request that, for the sake of public justice, they should consent to renounce the privilege in that instance, in so far as the body of parliament is concerned, as the individual member is understood to have renounced it for himself, by the acceptance of a military commission."²

Peers in England formerly tried by their peers for certain military offences committed abroad,

66. The privilege of parliament, however, so far as it concerns the peers, had been the subject of legislation in many of the earlier mutiny acts; the 1 Anne, c. 16, s. 42, runs thus,³ "Provided also, that if any peer of this realm shall commit any of the offences aforesaid, in any parts beyond the seas, and shall not have been tried for the same by martial law, and after his return into this realm shall be indicted of any offence hereby declared or enacted to be treason or felony; that then, and after such indictment, he shall have his trial by his peers, in such like manner and form as hath been accustomed." It may fairly be inferred from this clause, that peers were subject to trials by courts martial for any offence beyond the seas, as other officers and soldiers; and secondly, that within the realm, their privilege only availed in those cases where, for the offences declared to be treason or felony, other officers and soldiers were liable to be indicted and tried in the ordinary course of law. The terms of the mutiny act—"Any person commissioned or in pay as an officer,"—must necessarily include all peers and members of Parliament, who may be commissioned or in pay; and, since no exception to the general enactment now exists (the clause referred to, relating to peers, having for a series, of years been omitted,) it follows, that the peers and members of the lower house, in passing the statute in these general terms, have waived their privilege⁴ so far as it might

but now subject to military law as other officers.

(2) Essay on Military Law, p. 125.

(3) Similar are the 2 & 3 Anne, c. 20, s. 42; 3 & 4 Anne, c. 16, s. 43; &c., and 10 Anne, c. 13, s. 55.

(4) In point of fact the privilege from arrest does not extend to criminal cases; but, as may be learnt from a more recent authority—May, Law of Parliament, edit. 1851, p. 131, "it has been usual to communicate the

cause of commitment *after the arrest*, as in the case of Lord George Gordon for high treason in 1784, and Mr. Smith O'Brien, in 1848;" and in the journals, both lords' and commons', may be found instances where a similar course has been observed with respect to members who have been *under arrest* in order to trial by military and naval courts martial.

have been implicated by the arrest or trial of individuals. This also appears from the proceedings of the House of Lords, in March 1749, when an ineffectual attempt was made to insert a clause in the mutiny act, exempting peers from trial by courts martial.

67. Every officer sentenced to be kept in penal servitude ceases to belong to Her Majesty's service upon the confirmation of the sentence.⁵ But soldiers, whether convicted by courts martial, or by the civil power, are not, as a consequence of a sentence of penal servitude, discharged from the service, but are to be sent to a prison specially appointed for them.⁶

Officers are not amenable to military law after the confirmation of the sentence of penal servitude, but soldiers continue to be so.

68. Offenders in prison, whether under sentence of court martial, or otherwise, are amenable to justice. When it may be necessary to bring to trial persons who may be detained on a civil or criminal process, the 43 Geo. III. c. 140, empowers any of the judges of the courts of Westminster to award a writ of *habeas corpus* for bringing up any prisoner for trial before courts martial in like manner as they award such writs to bring up persons, detained in jail, before magistrates or courts of record. In the case of a prisoner undergoing imprisonment under the sentence of a court martial in any public prison other than military prisons, an order may be given in writing for such prisoner to be delivered over to military custody for the purpose of being brought before a court martial for trial.⁷ When confined in a military prison, the general or other officer commanding the district, &c., where such prison may be, has authority to give directions for this purpose.

Offenders may be brought to trial when imprisoned under ordinary process, or sentence of courts martial.

in common gaols,

in military prisons.

69. The mutiny act extends to officers and soldiers of any troops raised abroad, being mustered and in pay, and they are subject to its provisions and to the articles of war in like manner as Her Majesty's other forces.¹

The mutiny act applies to foreign troops.

70. Militia, and yeomanry or volunteer corps, though serving and in pay, are not amenable to the provisions of the mutiny act, "excepting only where by any act for regulating the said forces or corps the provisions contained in any act

Militia, yeomanry, volunteers, subject to mutiny act.

(5) Art. War, 20.

(6) Circ. Mem. Horse Guards, 21st February, 1861.

(7) Mut. Act, sec. 31.

(1) Secretary at war to generals or other officers commanding. War Office, 14th July, 1847.

for punishing mutiny and desertion are or shall be specifically made applicable to such forces or corps."²

Enrolled pensioners of local companies

and officers appointed to command them, are

amenable to military law, when on duty, and afterwards to courts martial for one year from date of offence.

Soldiers in the Indian army whilst on passage home.

71. The Act 6 & 7 Vict. c. 95 empowers Her Majesty to order out-pensioners of Chelsea Hospital³ to be organized as a local force within the united kingdom,⁴ the staff officers of pensioners acting as commandants of local companies in default of any special provision to the contrary; and enables Her Majesty to appoint to such force such other officers and non-commissioned officers of the regular forces or militia, whether from the full or half-pay or from the pension list, and to place the whole or any part of the force under the command of any general or other superior officer of the regular forces, and enacts (*sec.* 6) that the mutiny act and articles of war, then in force, shall extend to such pensioners, when called out or kept on duty, and to the officers and non-commissioned officers appointed to command them, and that courts martial for the trial of offences committed by such officers, non-commissioned officers and pensioners on such occasions may be held, and the punishment inflicted either during the time the pensioners are on duty or at any time within twelve calendar months after the offence shall have been committed, or the offender shall have been apprehended.⁵

72. Soldiers in the Indian army entitled to be sent home, continue subject to the company's mutiny act and articles of war until their debarkation in Great Britain or Ireland, but the Queen is empowered to provide by these articles for the punishment of offences, committed by such soldiers on the voyage, by sentence of court martial under *the* Mutiny Act and the Articles of War, and Her Majesty is pleased to direct that for the purpose of such court martial and punishment, they shall be considered as belonging to any regiment which the adjutant general shall appoint for that purpose.⁶

(2) Mut. Act, *sec.* 4.

(3) Extended to out-pensioners of Greenwich Hospital, who have served in the marines, by 9 & 10 Vict. c. 8, and to pensioners of the East India land forces by 11 & 12 Vict. c. 84.

(4) Extended to colonies by 10 & 11 Vict. c. 54.

(5) The regulations made by the secretary at war, under the powers conferred by the act, and establishing fines and penalties for absence from, and misconduct during, muster or in-

spection, do not contemplate a staff officer's resorting to a court martial, without a previous report of the case to the secretary at war, through the superintendent of pensioners, except in case an enrolled pensioner, actually called out on duty under arms in aid of the civil power, should conduct himself in a manner so violent and insubordinate as to render an immediate example necessary.

(6) 20 & 21 Vict. c. 66, s. 54. Art. War (E.I.C. Troops), 130.

73. To the description of persons, who are subject to the mutiny act and to trial by courts martial by the express provision of the mutiny act or other statute, may be added persons coming under the denomination of followers⁷ of the army in the field; who, though neither enlisted nor in pay, have ever been subject to orders according to the rules and discipline of war, and whether temporarily or permanently attached to, or momentarily and accidentally connected with, an army in the field, or on the line of march, are liable, by order of the commander of the forces, to trial by courts martial. The campaigns in the Peninsula afford examples of the trial, conviction, and punishment, in some cases capitally, of civilians, both men and women, British subjects, foreigners and natives of the country.

The provisions of the statute law do not extend to followers of the camp.

74. With reference to this extended jurisdiction of courts martial, it is particularly to be observed, that though courts martial, sitting in default of a competent civil judicature, are bound, by the express terms of the article under which they are held, to recognize such crimes only as are punishable by a court of ordinary criminal jurisdiction in England, and to apply to them such punishments alone, as by such laws are sanctioned; yet this limitation does not apply to the trial of followers of the army, which would now be held by order of a commander of an army in the field, by virtue of the discretionary power vested in him by the hundred and sixty-seventh article of war, and which were formerly held under the third article of the twenty-fourth section; the persons described in which were expressly "subject to orders according to the rules and discipline of war," and were thereby necessarily liable to military punishment for any breach of good order, whether as affecting the discipline of the army, or the private rights of individuals.

75. A very confused apprehension has been entertained respecting the operation of the third and fourth articles of the twenty-fourth section of the old articles of war; they have been by some most unaccountably blended together, when, in effect, they are directly the reverse of each other.⁸

(7) Queen's Reg. p. 287.

(8) Mr. Samuel, in his commentary on the Articles of War, has failed to make a very obvious distinction, when referring to the case of Jose Bernados

and Jose Antenos (page 700). The court for the trial of these persons, not being held by virtue of the 4th art. 24th sec., was not limited to punishments known to the common and

Where courts of British civil judicature are not in force, courts martial supply their place for the trial of soldiers.

76. These articles are literally obsolete, but as to their effect they are preserved in the hundred and sixty-seventh and the hundred and forty-seventh articles. The third article applied to retainers of a camp, and to all persons whatsoever serving in the field, where it would often be impracticable to carry into effect the minor punishments dictated by English law, and rendered persons, not otherwise amenable to military law, subject for the time to its control. The fourth article, referring only to persons forming an integral part of the army, applied to time of peace or inactivity; it was in this respect similar in effect to the present hundred and thirtieth article, which provides for the trial by courts martial of such persons, when accused of civil offences in places beyond the seas, where there may be no competent civil judicature.

77. The sovereign, by the exercise of the royal prerogative (as evinced in the article extending the jurisdiction of courts martial), as well of the chief civil magistrate as of the superior or the military state, by substituting a military for a civil court, makes no alteration as to English law, but simply in the channel of dispensing it,—neither suspends, supersedes, nor displaces it, but provides for the trial of offences; and, previous to the modification of this article, which will be presently adverted to, preserved to the military, when serving in foreign parts, where our laws do not extend *proprio vigore*, the inestimable privilege of trial by the laws of their country. A court martial, assembled under this article, ceases to be influenced by the authorities which ordinarily guide it; the mutiny act, the articles of war, the general regulations for the army, are no longer the text books by which to ascertain offence; they are only to be resorted to as affecting the constitution of the court, and the manner in which its proceedings are conducted; the article in question extending its competence to all crimes punishable by ordinary courts in England, and confining its award to sentences in conformity to English law.⁹ Its jurisdiction is

statute law of England; but, by the 3rd art. (under which it was held), was bound to proceed according to the rules and discipline of war, which have immemorially sanctioned either capital or corporal punishment as ap-

plicable to plundering, or offences against members of the army, or inhabitants of the country in which the army may be actively employed.

(9) Gunner John Suddis, R.A., having been sentenced to be trans-

essentially civil, the offences brought within its cognizance having no connection with military discipline, the punishment awarded by it being exclusively those known to the common and statute law, and the soldier himself, thus especially rendered amenable to it, appearing before the court rather as a citizen than a soldier. In England, the delinquencies of soldiers are not necessarily tried, as in most countries of Europe, by military law. Where they are ordinary offences against the civil peace, they are triable by the common law courts, the mutiny act having wisely declared the supremacy of the ordinary course of law, within the realm, and requiring commanding officers to deliver over to the civil magistrate, on application being made for that purpose, officers or soldiers accused of such offences, under a summary and severe penalty for any wilful infraction of the law.¹⁰

Supremacy of the courts of civil judicature.

78. The alteration in the article of war, to which allusion has been made, is very important, and essentially affects the rights of every British soldier. Previous to the year 1832, it was provided that "any officer or soldier accused of any capital or other crime punishable by the known laws of the land, but who may be serving in Gibraltar, or in any place beyond seas where there is no form of *our civil judicature in force*, should be tried by a general court martial, and if found guilty, should suffer death, or such other punishment as by the sentence of such general court martial may be awarded; such sentence, nevertheless, to be in conformity to the common and statute law of England."¹

Soldiers once subject to British law only.

79. That "our civil judicature" could apply only to civil judicatures similar, or analogous, to those of the kingdoms of England, Scotland, and Ireland, there can be no doubt, since it was the sense in which the article had been received and applied; it effectually secured a British soldier, when called beyond seas, in the execution of his duty, from trial by any

ported by a general court martial, held at Gibraltar on the 19th May, 1800, the question was argued before the Court of King's Bench, whether under the then article, which authorized punishment "according to the nature and degree of the offence," the sentence was necessarily regulated by the law of England. The only two judges who adverted to this point decidedly gave their opinion that such adherence was not necessary; but subsequently,

the King's declaration of the meaning of the article, communicated in a circular letter, dated 12th Dec., 1807, from the Duke of York to general officers commanding on foreign stations, until 1830 effected collaterally that, which has been done since then by the article itself in express terms, and restricted the punishment of crime to the limits of the common and statute law.

(10) Mut. Act, sec. 76.

(1) Articles of 1831, Art. 102.

now subject to
any judicature
under the
authority of
Her Majesty.

judicature but one assimilated to a British court of justice. It has, however, been deemed expedient to limit the operation of this equitable provision to places where there may be no civil judicature in force by the appointment or under the authority of Her Majesty ; (" by our appointment or under our authority ; ") a soldier, therefore, accused of civil crime, serving in *any place* beyond the seas, where there is no form of British civil judicature, is precluded from claiming to be tried by a court martial and according to the law of England, if there be any court of civil judicature in force, under the authority of Her Majesty, which may not declare itself incompetent to try him.³ Such court may be absolutely

(2) In the first edition, the author, at some length, had given his opinion of the importance and value of the then article of war, which secured a British soldier, accused of crime, from trial by any laws but British. Although his remarks are not directly applicable to the question, as it now stands, yet reproducing a part of them may be excused, if they tend to preserve the recollection of rights of which the British soldier has been deprived. He observed that " Though the supremacy of the English law is undoubted, and though every soldier has a common interest with his fellow citizen to maintain its superiority and integrity, yet it would be lamentable indeed, if, by the perversion of the reasoning which led to this desirable result in England and in such colonies as are guided by her laws, the British were the only soldier belonging to the several states in Europe, who was subjected to any code of foreign law, obtaining in the country, to which his duty and the orders of his sovereign might accidentally call him. No parallel can be drawn, as none exists, between an English subject spontaneously placing himself under laws, the protection of which he seeks, and a soldier, in the course of duty, serving under the colours of his king and country. An Englishman, on assuming the military garb, though he incurs the responsibilities and duties of a soldier, does not divest himself of the privileges of a Briton, the greatest of which is trial by jury and by the laws of his country on the alleged infraction of any part of them. The flag under which he serves guarantees the continuance of

those privileges, when ordered to places where foreign law prevails, to an extent which cannot be possessed by an individual voluntarily, and with a private object, removing himself from the sphere of British law. Individuals are necessarily obnoxious to the laws of the country in which they may reside ; but, as it is a *peculiarity* of English law that soldiers should be amenable to civil courts of judicature, it is surely no injustice to colonies or dependencies, annexed or ceded to the dominions of His Majesty, under the stipulation that they should enjoy their own laws, that this *peculiarity* of English law should not be grafted on theirs. By long usage, it has become a part and parcel of the law of every country in Europe, except England, that soldiers should be amenable to their own peculiar tribunals only, when criminally charged for civil crime. It is then but acting up to the very terms of a treaty to except British soldiers from the jurisdiction of the civil courts, to which soldiers under the laws in force previous to such treaty were not liable.

" It must be granted, as an abstract principle, that it is essential to the civil freedom and welfare of a community, that it should possess the power of trying and punishing, by its own laws, all offences committed against the public peace or social order. It may, therefore, be assumed to be an inherent right in all free states, that persons within their territories should be subject to their laws ; but in the instance of soldiers holding possession of a country governed by a different system and code of law from that prevailing in their own, an exception must

unknown and in opposition to the English constitution, and may consequently dispense law or apply punishments at variance with English law. A British officer and soldier is *now* exposed to any form of trial, even to the question, and to any penalties, which may be awarded by an arbitrary and foreign magistrate; the only condition is, that such judicature be appointed by, or under, the authority of Her Majesty.

80. On the surrender of a colony, good policy prescribes that the civil courts and magistracy should be reestablished as speedily as possible, and a few weeks, if not days, are ordinarily sufficient for these purposes; such civil judicature, then, if not in every sense in force by the appointment of Her Majesty, is clearly so, *under Her Majesty's authority*, and consequently, by the articles of war as altered, is rendered a competent judicature for the trial of a British soldier. The article of war in effect declares that a soldier shall be subject to any judicature, be it French, Spanish, Portuguese or Algerine which may be in force "under the authority" of Her Majesty, although the judges who compose it shall, but the week before, have been reduced to the

Impolicy of
existing regu-
lations.

be admitted; for it must be borne in mind, that soldiers constitute in themselves a distinct and separate community, acting together, not for private, but for public ends, and subject only (exclusive of their civil and natural obligation to their country) to the will of the prince for whose service they are engaged. If then the state in question claim the right of exercising jurisdiction over soldiers, to whom its protection is entrusted, it must be on the ground of special compact with the power whose sovereignty it acknowledges. The enquiry then resolves itself into the question, Does a prince, by refusing such privilege to a state under his protection, commit an act of injustice? In answering this question, the duty of the prince must be considered, as it relates not only to the country, but to the soldier. Both have claims on his justice; both have rights which he is called on to respect. To the country, he grants the free enjoyment of its own laws, protection from foreign invasion, and security from aggression by the soldiers in his service.

To effectuate the last of these objects, military discipline may be deemed sufficient. On the other hand, a prince is obliged, by common justice and a becoming deference to his own dignity, to maintain the civil rights and privileges of his soldiers. Neither reason nor justice requires that a sovereign should delegate to courts of judicature, at variance with those established in his own country, and administered by magistrates ignorant of the rights and privileges of his people, the power of punishing them, or such of them as may have been brought within the ordinary limits of their jurisdiction, not by private interest or inclination, but by obedience to his commands. Had a soldier been subject to every code of civil jurisprudence, obtaining in colonies under the protection of the British flag, six months' service in the West Indies, during the late war, might have subjected him to almost every code known to the several kingdoms of Europe." — *First edition*, (1830) pp. 23–32.

Impolicy of
existing regu-
lations.

subjection of the crown by the arms of the very men who are thus subjected to their jurisdiction. The impolicy of rendering a soldier amenable to a foreign magistracy, and to laws at variance with those of his country, may be more observable, if it be supposed that the judicature, to which the soldier is rendered responsible, has been recently reduced to the subjection of the crown; but it is not the less unjust that a British soldier, serving under the British flag, and in defence of the laws and interests of his country, should, after the lapse of any period, be subject to any laws but British. If a colony be permitted to retain its foreign form of judicature, in deference to the prejudices of its people, the English soldier ought, as heretofore, to be exempt from the operation of such laws, so long as his residence in such colony be in the course of duty; if, on the other hand, a colony adopt English law; if the trial be by jury, and in the English language, such colonists, being admitted to the rights of citizenship, may be deemed eligible, as magistrates or jury, to decide a question in which the rights of a Briton may be involved. It is surely anomalous to witness a British soldier, in the British uniform, serving under the flag which affords protection to, or *secures the obedience* of, a colony, pleading through an interpreter in the French or other foreign language; and if not submitted to the actual torture, yet importuned with questions, contrary to the spirit of all British law, by which to extort such replies as may excuse a decision of guilt.

81. M. Dupin, who wrote with much accuracy upon the military force of Great Britain, well observed: "Le gouvernement britannique a trouvé le secret de constituer une armée redoutable seulement aux peuples étrangers, et qui regarde, comme une partie de sa gloire, l'obéissance à l'autorité civile de sa patrie" . . . "aussi, malgré les déclamations des démagogues et des prétendus réformateurs radicaux, qui cherchent à renverser la constitution, les citoyens les plus jaloux de leur liberté ne craignent point l'armée anglaise, telle qu'elle est maintenant organisée."³

82. It is indeed true, that a British soldier feels it both

(3) Dupin, *Voyage dans la Grande Bretagne, &c.*, Force Militaire, vol. 2, pp. 35-40.

his pride and his duty to maintain the integrity, and submit to the operation of the institutions of his country; but why does he so venerate her laws? It is that he believes them to be superior to all others, to be more conducive to real liberty, to control the vicious with the least restraint upon the well conducted, to afford the fairest trial to the accused, and to offer the most effectual remedy for restoring to liberty him who may be unjustly subject to restraint. Moreover, they are the laws which from his infancy he has been tutored to respect, and in favour of which his prejudice is engaged. Can it therefore, I would ask, be good policy to render a British soldier indifferent to every form of civil jurisdiction, by subjecting him to all? If it were designed to prepare an army for the subversion of the laws, the civil authorities, and constitution of our country, and to meet the views of those men, whom M. Dupin designates as demagogues and pretended radical reformers, could a better plan be devised, or one more suited to the end, than to subject British soldiers to various codes of foreign law and various foreign judicatures? Is it not a natural result, that the soldier should speedily become indifferent to the preservation of institutions from which, by the policy of his country, he has ceased to derive advantage, except for the limited periods during which he may serve at home? Can interest actuate him to desire the preservation of laws, from a participation in which, for the greater part of his life, he is cut off in deference to the prejudice of foreigners? Must he not be convinced that, in the estimation of the government, the boasted superiority of British law is but ideal, or that his birth-right to be tried by those laws, has been sacrificed to the expediency of gratifying newly-acquired colonies? Respect for the civil authorities of his country is at present characteristic of the British soldier: can that feeling be perpetuated if he become indifferent to the laws of Great Britain? Should he still retain a prejudice in favour of its institutions, will he not eventually feel jealous of privileges from which he is cut off, and is it not a consequent that he should, with less reluctance, lend his aid to the subversion or annihilation of the objects of his jealousy? M. Dupin said rightly, that a part of the glory of a British soldier consists in obedience to the civil authorities of his country; but the soldier can never be convinced

that his glory or his honour is concerned in any obedience claimed for a foreign judicature. His feelings, as a soldier, will indeed lead him to submit, where submission is required by his military superior, but he will do so sullenly, and under the impression that the ties of military discipline have been perverted to deprive him of his birth-right.

CHAPTER III.

LAWS, RULES, REGULATIONS, AND CUSTOMS, CONNECTED
WITH THE ADMINISTRATION OF MILITARY LAW.

83. COURTS MARTIAL are regulated by the mutiny act and the articles of war, and by the general orders of the sovereign relating thereto, and extant at the time; their practice is moreover regulated, in points where the written law is silent, and chiefly, as affects the form adhered to, by the custom of war: by which expression, as here applied, must be understood the customs and usages of the British army.

Written law of
courts martial,

and custom for
their guidance.

84. The mutiny act takes effect and continues in force, within Great Britain, from the twenty-fifth of April of one year to the same date in the following year; in Ireland, Jersey, Guernsey, Alderney, Sark and Man, from and to the first of May; in Gibraltar and the Mediterranean, Spain and Portugal, from and to the first of August; in all other parts of Europe where Her Majesty's forces may be serving, in the West Indies and America, from and to the first of September; at the Cape of Good Hope, the Isle of France and its dependencies, St. Helena, and the western coast of Africa, from and to the first of January; in all other places, from the first of February of one year to the same date in the ensuing year; but notwithstanding these specified dates, by a provision first introduced into the mutiny act of 1829, it becomes and is in full force beyond the seas from and after its receipt and promulgation in general orders.¹

The mutiny act
continues in
force

between certain
fixed periods at
home and
abroad;

or abroad
without refer-
ence to these
dates, if pub-
lished in gene-
ral orders.

85. The articles of war continue in force from their receipt and publication, until revoked or superseded by others. Her Majesty affixes her royal signature to these rules and articles, without the superscription of a date, and thus authenticated, and printed by the Queen's printer, they are published by Her Majesty's command for the better

The articles of
war are in force

from a certain
date.

(1) Mut. Act, sec. 89. Circular, War Office, 8th April, 1829.

Their continu-
ance not de-
pendent on
that of mutiny
act.

government of all her forces *from* a certain day expressed in the title.

86. Their annexation to the mutiny act, in the form to which military men are accustomed, is for their convenience, and to facilitate reference. They are not essentially inseparable. The mutiny act of 1831, expiring in the United Kingdom on the 24th March, 1832, was, by an act of parliament of that date, continued for one month at the several stations respectively. The articles of war were not again published to the army, but continued in force without any express declaration of His Majesty. General officers in command were informed, by letter from the adjutant general, that an^d act had passed for continuing the mutiny act for one month, up to which period the court martial warrant in their possession would remain in force; but no mention was made of the articles of war, nor was this act ever communicated to the army.

Supposed case:
the mutiny act
having expired;

87. The question has been mooted: Were the mutiny act permitted by inadvertence to expire, would the articles of war expire also, and the army be *ipso facto* disembodied? or, would the articles still be obligatory on the forces of the Crown, and the individuals composing the army be bound to serve till regularly discharged?

new mutiny act
not received
before expiration
of old one:

88. The case has also been put: Were the new mutiny act not to be received, or the passing of it known, at a station, at the period when the old one expires; are the articles of war in consequence inoperative, and the supreme military authority without the power of enforcing discipline?

89. The latter question is one of moment to practical men—to officers who are responsible for the discipline of the troops under their orders, the case having frequently occurred abroad in former years, and having happened^d within the United Kingdom since the provisions of the mutiny act, as to its duration, have been modified, as regards places beyond the seas.

consent of par-

90. Sir William Blackstone lays it down as the law, that

(2) 2 Will. 4, c. 18.
(3) The mutiny act of 1831 expired in England on the 24th March, 1832, and in Ireland and the Channel Islands on the last day of that month. The act for continuing the mutiny act is dated the

24th March; and was communicated to the army, by letter from the adjutant general, on the 2nd April. Both in England and Ireland the troops, therefore, were for all practical purposes without a mutiny act for some days.

the standing army is *ipso facto* disbanded at the expiration of every year, unless continued by parliament.⁴ The first paragraph of the preamble of the mutiny act declares: "Whereas the raising or keeping a standing army within the United Kingdom of Great Britain and Ireland, in time of peace, unless it be with the consent of parliament, is against law." The dictum of the learned judge, as applied to standing armies within the United Kingdom, cannot therefore be questioned; but he does not assert, nor is it to be inferred, that the army would be disbanded for want of a mutiny act, if the consent of parliament to its continuance were expressed, either by granting funds for its support, or in any other way. The recruit is required by the legislature to be attested to serve during the term of his engagement, provided Her Majesty should so long require his services;⁵ so long, therefore, as the keeping up that part of the army, to which an individual may be attached, is not against law, so long does that law bind him to serve.

liament not expressed.

91. Before the revolution, the prerogative of the crown, as to the government of the army, was not limited by any enactment; and, although, from the first, the mutiny act has recited the article of the Bill of Rights, which declares, that "the keeping up a standing army within the kingdom, in time of peace, unless it be with consent of parliament is against law;" yet, in the time of William the Third, the mutiny act was repeatedly suffered to expire; and, for the intervening periods,⁶ the army was governed as before the abdication of King James the Second, by an exertion of the royal prerogative expressed in the articles of war. As the commons were so especially jealous of a standing army, this is most observable, and all the more so, as the longest period, nearly four years, was in *time of peace*:—after the conclusion of the peace at Ryswick, parliament did not interpose to provide any law for the government of the forces, although their numbers were limited by a specific enactment.⁷

Practice immediately subsequent to the revolution.

(4) 1 Blackstone, 414.

(5) Declaration — Schedule to Mutiny Act.

(6) There was no mutiny act from 10th November, 1689, to 20th December, 1689; from 20th December, 1691, to 10th March, 1693; from 1st March, 1693, to 10th April, 1695; from 10th

April, 1698, to 20th February, 1704.

(7) On the peace of Utrecht, the mutiny act was allowed to expire, which it did on the 25th March, 1713, but an act, 12 Anne, c. 13, (*et* c. 12,) "for the better regulating the forces to be continued in Her Majesty's service, as for the payment of the said forces

The power of the crown to make articles in the army abroad,

expressly laid down formerly ;

The power of the crown to make articles for the army abroad, admitted in mutiny act,

and acted on in the present articles of war.

92. To carry the argument further, as it affects the army in the United Kingdom, can be productive of no practical result ; and the question, as it concerns the portion of the army serving abroad, has always been one of less difficulty, since the very declaration of the legislature, that *within the United Kingdom, it is against law to keep a standing army*, is an indirect admission that it is *lawful* to do so *out of the United Kingdom*. The first mutiny acts which made any express provision as to the government of the land forces *out of the realm* were those passed in the reign of Queen Anne, and they especially provided that nothing contained therein should “ extend to abridge Her Majesty’s power of forming, making, and establishing articles of war, and creating and constituting courts martial, and inflicting penalties by sentence or judgment of the same, in such manner as might have been done by Her Majesty’s authority, beyond the seas, in time of war, before the making of this act.”^s

93. The mutiny act of the current year does, in effect, declare the same principle, by expressly enacting that it shall be lawful for Her Majesty to make articles of war, and by providing that no person *within the United Kingdom of Great Britain and Ireland, or the British Isles*, shall by such articles be subject to punishment extending to loss of life or limb, or to be kept in penal servitude, except for crimes which by this act are expressly made liable to such punishments. The offences defined in the latter part of the fifty-fifth article, the fifty-seventh and three following, and the sixty-second, articles of war, for which death or penal servitude may be awarded by general courts martial, are not to be found in the mutiny act: these articles, derived from the royal prerogative, are obligatory on the army; and, similarly, all the other articles of war, in *foreign parts*, are

their quarters,” was passed on the meeting of parliament and came in force on the 25th July, 1713; this was succeeded by two similar acts, the 13 Anne, c. 3, (*al.* 12 Anne, st. 2, c. 2,) in 1714, and the 1 Geo. 1, st. 2, c. 2, in 1715: the extreme punishment, provided under all these acts, was “ not extending to life or limb;” this restriction was removed, upon occasion of the rising in favour of the Chevalier, by the 1 Geo. 1, st. 2, c. 34, (*al.* c. 9.)

“ an act for preventing mutiny and desertion by enforcing and making more effectual an act of this present parliament, entitled ‘ an act for the better regulating the forces to be continued,’ &c.,” and this act was the first of the uninterrupted series of mutiny acts, which have passed each year, from that to the present.

(8) 1 Anne, c. 16, s. 37; 2 & 3 Anne, c. 20, s. 37, &c.

binding on Her Majesty's forces, independent of the reflected power of the mutiny act.

94. As to the constitution of courts martial, the oath of each member undoubtedly refers to "an act now in force for the punishment of mutiny and desertion, and other crimes therein mentioned,"¹ but, assuming that the new mutiny act had not arrived at a station at the period when the old mutiny act may be extinct, yet (taking no notice of the addition to the clause for regulating the duration of the mutiny act, which provides that the act shall become and be of full force, anything therein stated to the contrary notwithstanding, from and after the promulgation of the act in general orders beyond the seas), the unrevoked articles of war would, to a certain extent, prolong the influence of the mutiny act to which they refer, and with which they had been circulated to the army.

In certain cases the soldier would consider the articles of war as prolonging the mutiny act.

95. The second section of the articles of war, with certain other articles, which specify the most material duties and obligations of military men, and which contain a declaration of crimes and punishments, are required to be read and published at the head of every corps in the service, once in every three months.² An abstract of the most important duties and obligations, and of the penalties incidental to the commission of the most conspicuous offences, is inserted in the personal account book of soldiers. Every precaution is therefore taken, that a soldier may not be betrayed into crime, from ignorance as to the penalty involved by it. That axiom, which rejects *ignorance of the law* as an excuse, can never be more justly applied than to military delinquents.

Ignorance of the law excuses not.

Publication of the articles of war,

96. The Queen's³ regulations and orders for the army, approved by Her Majesty, published by order of the commander in chief, and of which those parts which are meant to regulate the conduct of officers and men are directed to be read to them at least once in every three months,⁴ have,

and general regulations and orders

(1) Art. War, 154.

(2) Art. War, 194.

(3) Before 1837, these regulations were styled "The General Regulations and orders for the Army," but on the issue of a revised edition in that year, when his late majesty King William

the Fourth signified his royal approbation, they were designated "The King's Regulations," and this precedent has been uniformly followed during Her Majesty's reign.

(4) Queen's Reg. p. 137.

so far as concerns the regulating of that body, for whose guidance they were framed, all the binding force of military law. In a military court, they are received as evidence on record; but, by a court of civil judicature, they would only be admitted in evidence, under the same rules as any other written instrument.

That which the sovereign is pleased to declare, is paramount as regards the law military.

97. The maxim, *quod principi placuerit, legis habet vigorem*, holds good when applied to the law military,—with the one exception as to crimes punishable by loss of life or limb, within the united kingdom;—and that other maxim of Roman law, *imperator solus et conditor et interpres legis existimatur*, is scarcely less applicable. The mutiny act is doubtless the foundation of military law as now obtaining, and especially with reference to its influence in the United Kingdom; but the superstructure and the interpretation of it, as to military courts, rest solely with the crown. The only ground on which an order, issuing in the name of Her Majesty, and duly promulgated, could be, in any degree, questioned, would occur in the almost impossible case of a palpable discordance with, or rather contradiction to, some provision of the mutiny act or other enactment of the legislature. A court martial, in such improbable case, (which, if it ever arose, could only be by inadvertence in the channel through which the order may be conveyed,) would consider the act of parliament as the true criterion of the intention of the sovereign,—in the case of the mutiny act, being bound by the oath, (enjoined by the articles of war,) to the letter of the statute.

Courts martial are regulated by the acts and articles of the service to which the prisoner may belong.

98. Courts martial, on which officers of marines may be associated with officers of the army, or Indian army, or of both those services, or which may be composed exclusively of officers of either branch of the land forces may (§ 22) be held for the trial of persons belonging to any of these three services. When held for the trial of a person belonging to the army, or the Indian army within the United Kingdom, they are regulated to all intents and purposes, in like manner as if they were composed of officers of the army only, and the provisions of the mutiny act, and articles of war are applicable to the proceedings: ⁵ or if held for the trial of a person belonging to the royal marines, then the provisions of the marine mutiny act and

articles: and if held for the trial of officers or soldiers in the Indian army, and out of the United Kingdom, they are to be regulated by the act and articles of war for punishing mutiny and desertion of officers and soldiers in the Indian army.

99. Offences against any former mutiny act or articles of war are punishable⁶ under the existing mutiny act, subject to the limitation as to time (§ 40) already mentioned.

And by the act and articles then in force.

100. Courts martial, when supplying the place of courts of civil judicature, out of the Queen's dominions, at Gibraltar, or in other places in the Queen's dominions beyond the seas (except India) where there is no competent civil judicature in force, are bound to conform in the sentence to "the usages of English law in regard to the punishment of offenders;" or, in India, to "that law as modified by laws applicable to India."⁷

Courts martial supplying the place of courts of civil judicature are guided by the common and statute law;

101. Courts martial, held by armies in the field for the trial of followers of the army, should also be influenced by the spirit of English law, so far as the same may be applicable; though in many cases the custom of war can be the only justification of the particular nature of the punishment which it may be necessary to inflict.⁸

as are also courts held for the trial of followers of the army in the field, as far as possible.

102. It has been debated whether courts martial, exercising jurisdiction under martial law in conquered or ceded colonies, ought not, on the trial of non-military persons, to be guided, as to the sentence, by the laws ordinarily prevailing in those countries, though opposed to English law; and an opinion to this effect is said to have been given in the house of commons, by Sir Robert Gifford, attorney general, on the debate respecting the sentence awarded by a general court martial at Demerara, in 1823, in the case of the missionary Smith.⁹ It is remarkable, that though several learned members, and especially Lord Brougham, in a most able and eloquent reply, contended for the opposite principle, showing, that as the court martial could, from English law only, have derived a jurisdiction, so ought its sentence to have been influenced by those laws alone,¹ yet he made no reference to the order of His Majesty of the 12th December, 1807,

Whether courts martial, in case of martial law, in colonies, are to be guided by the law of the place, or the law of England.

(6) Mut. Act, sec. 97.

(7) Art. War, 145, 146, 147.—See § 77, 1052.

(8) See § 74, 75.

(9) Substance of the debate on the

1st and 11th June, 1824, published by the London Missionary Society, p. 196: reprinted, Hansard. New Series, vol. XI.

(1) Substance of the debate, p. 236.

(§ 1053) notwithstanding he set out upon the principle, not subsequently questioned, that if Smith was amenable to the court martial at all, he was so *as a soldier*. Lord Brougham stated it as an axiom, "that the proclamation of martial law renders every man liable to be treated as a soldier." If then this be the law, if a civilian, under a proclamation of martial law, be amenable to courts martial *as a soldier*, a knowledge of the sovereign's pleasure respecting the jurisdiction of such courts is indispensable to a right understanding of the question.

103. There can be no doubt, but that the prerogative of the crown may be constitutionally employed in providing for the trial of members of the army, accused of offences not connected with military discipline, when the ordinary tribunals are superseded by a proclamation of martial law, (itself justified by necessity,) and also in Her Majesty's foreign possessions, where there may be no civil judicature in force.

Courts required
to refer to
English law in
all cases.

104. At the time of Mr. Smith's trial, the King had been pleased to make such provision, by an article of war applying to places beyond the seas, where there was no form of British civil judicature *in force*; and had, by the general order referred to above, declared its true intent and meaning to be, "that courts martial exercising jurisdiction under it, were bound to award such punishments only as are known to the laws of England." The articles of war now *expressly* declare that, which this order had previously explained, to be the meaning of the articles then existing; the law as applicable to the present question, is identically the same now as then. The words *in force*, similarly employed in the old and new articles, are particularly to be noticed; for though there may be a form of civil judicature, yet, if it be not *in force*, an officer or soldier accused of any crime, must, by virtue of the article, be tried by a general court martial. Such a case arises on a proclamation of martial law. The jurisdiction of the courts of the civil judicature being necessarily suspended, it is not *in force*, and consequently the jurisdiction of courts martial, over civil crimes committed by soldiers, commences. In those cases, where a soldier is not

amenable, under other circumstances, to the civil courts, the law, or the mode of dispensing it, so far as regards a soldier accused of civil crime, is not altered by a proclamation of martial law. If then, the statement of law by Lord Brougham be correct, if "the proclamation of martial law renders every man liable to be treated *as a soldier*," there seems to be no doubt but that Mr. Smith was amenable to English law only.

105. The contrary position involves this apparent absurdity: in the events of the trial of two British subjects, for the same offence, under a proclamation of martial law, in a place ordinarily governed by *foreign* law; the one being a soldier, the other a civilian, the same court martial is to try the one offender, *being a soldier*, by English law; the other *as a soldier*, by foreign; and, on a finding of guilt against both to an equal degree, and on an identical charge, is nevertheless to award a widely different punishment. It must be remembered that there is only one form of oath for members of courts martial, whether the court be held under a proclamation of martial law or in the ordinary course of the law military. A member of a court martial swears that he will duly administer justice according to the articles of war and the mutiny act; and, if any doubt shall arise which is not explained by the said articles or act, according to his conscience, the best of his understanding, and the custom of war in the like cases. Conscience, therefore, informed by the application of the understanding to the subject, and guided by the custom of war, is the only rule by which to deal with cases not provided for in the articles and act. An officer is bound, by conscience, to make himself acquainted with the orders of his sovereign touching courts martial, and with the articles of war; these orders and articles, in certain cases, refer him to the law of England,—of which, therefore, an officer may be expected to have a competent knowledge; but conscience will not impute any criminality to the absence of all knowledge of Dutch or any foreign law.

Whether courts martial, in case of martial law, in colonies, are to be guided by the law of the place, or the law of England.

106. The author cannot presume to say what may be the correct course to follow, but he is free to confess, that as a member of a court martial, so long as the oath for members, the mutiny act, the articles of war, and the orders of the sovereign continue unaltered, he could not, whilst awarding

punishment on any trial by a court martial, be influenced by any law or custom, not to be traced to the articles of war, the mutiny act, the law of England or the custom of war.

Queen's troops
to obey the
articles of war
for late com-
pany's troops,
when not at
variance with
the articles of
war.

107-9. The Queen's troops, when serving in India, are duly to observe and to obey the articles of war established for the Indian army, where such articles are not at variance with the articles of war made by the Queen for the government of all her forces.³ Courts martial in India for the trial of civil offences (§ 100) are guided by the modifications of English law applicable to India.⁴

(3) Art. War, 192.

(4) Art. War, 146.

CHAPTER IV.

OF MILITARY CRIMES AND PUNISHMENTS.

110. THE ordinary jurisdiction of courts martial is limited, as has been already remarked, (§ 30) to the trial of offences, to the prejudice of good order and military discipline, declared by, or in conformity with the provisions of, the mutiny act. They may perhaps be most conveniently arranged with reference to the punishments which are assigned to them. A few observations will be appended upon some of those, which are enumerated in this chapter, but they will be very brief, as the offences specified in the written law are, generally speaking, clearly defined, susceptible of very little difference of opinion as to their meaning, and the proof, necessary to establish charges for them, proportionably obvious.

Military crimes are here arranged according to the punishments to which they are liable.

111. The punishments which courts martial are ordinarily called on to award are either *peremptory*, that is, specially enjoined by the letter of the law; or they are *discretionary*,¹ that is, the court in its judgment applies such punishment as it may deem proportionate to the offence, the same being authorized by the mutiny act, articles of war, or by the custom of the service.

Punishments are either *peremptory* or *discretionary*.

112. The peremptory punishments awarded by courts martial for military offences apply only to officers, except the forfeitures for habitual drunkenness (§ 210), which however are discretionary as to their duration between the prescribed limits.

PEREMPTORY PUNISHMENTS; officers;

113. But before particularising offences and the punishments which courts martial may award on conviction, it will be well to recapitulate the penalties which, in certain cases being consequent on conviction, do not need to be specified in the sentence, and are in addition to any sentence which the court martial or other court may award.

Penalties consequent on conviction.

(1) The word in old articles is "arbitrary."—See Grose, vol. 2, p. 110, &c.

Officer transported ceases to belong to service.

114. Every commissioned officer sentenced to penal servitude, when such sentence has been confirmed, thereupon ceases to belong to Her Majesty's service.¹

All soldiers forfeit pay and service when imprisoned under sentence or confined previous to conviction.

115. No soldier is entitled to pay or to reckon service towards pay or pension, when in confinement under a sentence of any court, or during any absence from duty by commitment or confinement as a deserter by confession (§ 240), or under any charge of which he may afterwards be convicted, either by court martial or any court of ordinary criminal jurisdiction.² Soldiers, serving under the provisions of the army service act, are subject to the above forfeitures, and moreover in their case, any time during which they may be imprisoned under sentence of a court martial, or of any other court duly authorized to pass such sentence, is not reckoned as a part of the limited service for which they were enlisted or re-engaged or for which their term of service may have been prolonged.⁴

Soldiers enlisted for limited service forfeit time during imprisonment under sentence.

Deserters forfeit prize money,

116. Officers, non-commissioned officers and soldiers entitled to any share in any prize or capture or grant on account of service, who desert, thereby forfeit the same to Chelsea Hospital, unless restored by royal proclamation or otherwise pardoned.⁵

unless pardoned,

and moneys in savings bank, subject to remission.

117. Soldiers convicted of desertion forfeit all moneys in the regimental savings bank, but the forfeiture may be remitted by the secretary of state for war.⁶

Soldiers convicted of desertion or absence without leave forfeit pay for days of absence.

118. Soldiers, convicted of desertion, or of absence without leave, forfeit their pay for the day or days during which they were in a state of desertion, or absent without leave; ⁷ and soldiers found guilty of desertion, wilful maiming (§ 232), or tampering with their eyes (§ 233), the finding of the court martial having been confirmed,—sentenced to penal servitude or discharged with ignominy,—or found guilty of felony, or of any crime or offence, which in England would amount to felony,—thereupon forfeit all advantages as to additional pay, good conduct pay, and pension on discharge, which might have accrued from their *former* service, and also all medals and decorations for field service or good con-

Deserters &c. forfeit former service,

(2) Art. War. 20.

(3) Art. War, 173.

(4) Art. War, 172. Army Service Act, sec. 8.

(5) 2 Will. 4, c. 53, s. 3.

(6) Royal Warrant—Savings Bank par. 9.

(7) Art. War, 175.

duct, together with any accompanying gratuity.⁸ The forfeited medals are returned to the mint,⁹ but any such soldier subsequently performing good, faithful, or gallant services may be restored to the whole or any part of his service, on the report of the commander in chief, and Her Majesty's pleasure thereon being signified through the secretary of state for war.⁸

medals and gratuities.

The benefit of forfeited service may be restored.

119. Every conviction, by a court of criminal jurisdiction, of any offence amounting to felony, or by a court martial, of desertion under any circumstances, or of any other offence, unless the punishment or forfeiture awarded on conviction shall have been wholly remitted by competent authority,¹ entails an entry in the regimental defaulter book and the consequent forfeiture for twelve months of a good conduct badge, and of one penny a day, if the soldier is in possession of this distinction; or, if he is not, renders him ineligible for this reward for two years.³

Forfeiture of advantages under good conduct warrant, consequent on conviction by court martial, or by any other court of criminal jurisdiction, for felony.

Forfeiture of good conduct pay,

120. Every serjeant or other non-commissioned officer above the rank of corporal, who can claim good conduct pay is subjected, in consequence of reduction by the sentence of a court martial, to the forfeiture for one year, of one penny a day, of such good conduct pay.³

by non-commissioned officer, on reduction to the ranks.

121. The only offence now placed beyond the discretionary power of courts martial by the mutiny act, and *not* also specified in the articles of war, is :—

Offence punishable peremptorily by mutiny act.

Sec. 59. Unlawfully detaining any officer's or soldier's pay for the space of one month, or refusing to pay the same when due.

Detaining pay.

Upon proof of this offence, before a court martial, the act directs that the offender shall "be discharged from his employment, and shall forfeit one hundred pounds."

122. The offences declared by the articles of war punishable *peremptorily* on conviction, no discretionary power vesting in the court, are :—

Offences punishable peremptorily by the articles of war.

Art. 38. Misconduct, or vicious behaviour in a chaplain derogating from the sacred character with which he is invested :

Peremptory articles.

39. Perjury: (§ 127)

43. Traitorous or disrespectful words against Her Majesty or any of the royal family :

(8) Art. War, 171. Queen's Reg. p. 173, 174.
p. 193. (2) Revised Good Conduct Regulations. 10th Sept. 1860, para. 10.
(9) Queen's Reg. p. 193. (3) *Id.* para. 13.
(1) Art. War, 171. Queen's Reg.

Peremptory
articles.

- Art. 44. Being *concerned in any fray*, and disobeying, drawing upon, or offering violence to, another officer, *though of inferior rank*: (§ 128)
48. Persuading to desert; entertaining and not reporting deserter:
63. Sending flag of truce to the enemy without authority:
64. Giving a parole or watchword not received, *without good and sufficient cause*:
65. Spreading reports in the field calculated to create unnecessary alarm in the vicinity or rear of the army: (§ 129)
66. Using words in action or previous to going into action, *tending* to create alarm or despondency: (§ 133)
67. *Producing effects* injurious to the service, by improper disclosures: (§ 129-33)
68. Quitting ranks in action without orders, to secure prisoners or horses, or under pretence of taking wounded to the rear:
69. Leaving guard, picquet, or post; becoming prisoner by neglect, or disobedience, or passing outposts:
70. Seizing or appropriating, *contrary to existing orders*, supplies proceeding to the army: (§ 134)
71. *Being in command* and conniving at the exaction of exorbitant prices for houses or stalls let to sutlers; laying a duty, taking a fee, or being interested in the sale of provisions or merchandise brought into any garrison, fort, or barrack, &c.:
72. Impeding or refusing to assist the provost marshal, or *other officer* legally exercising authority:
73. Breaking arrest:
80. Drunkenness on duty *under arms*: (§ 135)
83. Scandalous behaviour, unbecoming the character of an officer and a gentleman: (§ 137, 138)
88. Through design or culpable neglect, omitting or refusing to make or send a return or report, or *knowingly* making a false return or report to a superior officer, authorized to call for a return or report: (§ 139-41)
89. Making a false muster of man or horse; *knowingly allowing* or *signing* a false muster roll, certificate, or return; conniving at untrue documents; concealing or omitting facts, directed to be stated, to excuse any officer or soldier from muster or duty:
90. By any false statement, certificate, or document, or omission of the true statement, attempting to obtain for any officer or soldier, or other person, any pension, retirement, half-pay gratuity, sale of commission, exchange, transfer, or discharge:
91. Making or being privy to any false entry, alteration, or erasure in any account, description book, attestation, record, register, discharge, or other document, whereby the real services, causes of discharge or disability, wounds, conduct of, or sentence of courts martial upon, any person, shall not be truly given; wilfully omitting to report or record facts relating thereto, according to *existing* regulations:
92. Intentionally making false return, report or statement of arms, ammunition, clothing, money, stores, or provisions; by *false document*, conniving at embezzlement; by producing false vouchers, or in *any other way*, misapplying public money for purposes other than those for which it was intended: (§ 142, 143)

Art. 93. By concealment or wilful omission, attempting to evade the true spirit and meaning of orders and regulations relating to the foregoing points: (§ 144) Peremptory articles.

95. Demanding unnecessary billets; quartering wives, children, or servants in houses, without consent of occupier; taking money to free from billets: ^a

100. On application made for that purpose *wilfully* neglecting or refusing to deliver to the civil magistrate, or to assist in the apprehension of officers or soldiers, accused of crimes punishable by law: ^b (§ 145-47)

101. Protecting any person from creditors, on pretence of being a soldier; protecting a soldier in any manner not allowed by the mutiny act. (§ 148)

123. The peremptory punishment under these articles is confined to commissioned officers only, being in each case *cashiering*, except that applicable to a chaplain, on conviction under the thirty-eighth article,—*to be discharged*. Punishments thereby prescribed.

124. To the above offences, for which the articles of war peremptorily direct a specified punishment to be awarded by courts martial, may be added:— The article for crying down credit, peremptorily prescribes

Art. 7. Commanding a corps and not crying down credit of soldiers, on its first coming to any place where it is to *remain* in *quarters*. (§ 126)

125. The article declares that “the said commanding officer, refusing or neglecting to do so, shall be suspended for *three months*, during which time his whole pay shall be applied to the discharging of such debts as shall have been contracted by soldiers, under his command, beyond the amount of their daily subsistence.” the penalty of suspension;

126. *Art. 7.*—This article is remarkable from its isolated position with respect to the penal articles, from its not pointing out how the penalty declared by it shall be enforced, and from its being opposed to the principle of the hundred and twenty-first article of war, the object of which is to prohibit the suspension of officers. It is also remarkable, though the suspension of the officer is peremptory, yet that the *overplus* of pay may be returned to him. Although the infraction of the letter of this article is not infrequent, yet it would be vain to seek for precedent as to its application. It is doubtful whether the penalty declared by this article may be enforced summarily, or whether the intervention of a court martial is necessary to its enforcement, for unlike other cases, where suspension how enforced?

(4) Mut. Act, sec. 87.

(5) Mut. Act, sec. 76.

Crying down
credit of soldiers.

Time, and

mode of making
proclamation;

Perjury.

the false
swearing must
be wilful;

and lawfully
required

pay is interfered with, neither the article specifies the right of appeal, nor, as in the eighth article, directs that "the matter shall be enquired into, and if necessary, tried before a competent court martial," "if the officer . . . shall protest against such summary proceeding" (§ 367). If a general court martial were charged to try the matter, the question would be, whether or not proclamation had been made within a reasonable time; which, perhaps from collateral passages in former articles of war, is generally understood to be four days; the court could have no power to award the suspension, nor any discretion as to the returning of the pay. The ordinary mode of making the proclamation is by a serjeant, with a drum and fife or trumpet, the serjeant halting at intervals and proclaiming that if the landlords or inhabitants shall suffer the soldiers to contract debts, it will be at their own peril, the officers not being obliged to discharge such debts.

127. *Art. 39.*—The mutiny act of 1855 extended the ordinary jurisdiction of courts martial to perjury, and wilfully making a false declaration was inserted in 1857, but perjury only is specified in the article. Perjury is defined to be a *wilful* false oath, by one who, being *lawfully* required to depose the truth in any *judicial* proceeding, swears *absolutely* in a matter *material* to the point in question, whether he be believed or not.⁶ The false oath must be *wilful*, and proved to be taken with some degree of deliberation; for if upon the whole circumstances of the case, it shall appear probable that it was owing, rather to the weakness than perverseness of the party, as where it was occasioned by surprise or inadvertency, or mistake of the true state of the question, it will not amount to perjury.⁷ The oath must be *lawfully* required in a *judicial* proceeding. The law takes no notice of any false oath, but such as is committed in some court of justice, or before some magistrate or proper officer, having power to administer an oath. When an oath is required by an act of parliament, but not in a judicial proceeding, the breach of that oath does not amount to perjury, unless the statute enacts that such oath, when false, shall be perjury, or shall subject the offender to the penalties of perjury. The mutiny act declares that any person taking a false oath, in any case

(6) 1 Hawkins, 318.

(7) 1 Hawkins, 318.

where an oath is required to be taken by it, shall be deemed guilty of wilful and corrupt perjury, and liable to the penalties thereto attaching.⁸ The *swearing* must be *absolutely* in a matter *material*. He who swears a thing according as he thinks, remembers, or believes, cannot, in respect of such an oath, be found guilty of perjury.⁹ But a man may be indicted for perjury in swearing that he *believes* a fact to be true, which he must know to be false.¹⁰ Officers and soldiers guilty of prevarication or otherwise misconducting themselves in giving their evidence (§ 439) may be dealt with under the hundred and ninth article, as also for the offence of persuading another to take a false oath, whether personally or by letter, by reward, promises, or threats, or by any other mode or means.

Art. 39.

it must be
absolute in a
matter material;

prevarication
and subor-
nation of
evidence,
dealt with
as military
offence.

128. *Art. 44.*—In the articles of war, before the year 1829, the punishment of the offence described in this article was discretionary, and the present fifteenth article, (which gives power to all officers *of what condition soever*, though of an inferior rank, to quell all quarrels, frays, and disorders, though the persons concerned should belong to another corps, and to order officers into arrest and soldiers into confinement,) was united with it, and formed the fourth article of the seventh section. To substantiate a charge under this article, so as to compel the peremptory punishment, it must be shown that the officer was concerned in the fray; and that he was ordered into arrest, and refused to obey the order; or, that he drew his sword, or offered violence to the officer ordering the arrest.

Disobeying
orders in case
of fray.

129. *Art. 65, 66, & 67.*—It may be observed as to the sixty-fifth article, that the violation of it consists in spreading, by words or by letters, reports calculated to create unnecessary alarm by spreading *such* reports. To convict on this article, as it stood until altered in the articles of war for the year 1835, it was necessary to prove that the reports were *false*, falsehood forming the essence of the offence; but it would be now sufficient to prove that the reports are calculated to create *unnecessary* alarm, although not necessarily false.¹

Spreading false
reports.

(8) Mut. Act, sec. 96. As to the required proof, see § 868, 1028.—The punishment of perjury and subornation of perjury before a civil court is, by common law, fine and imprisonment, and, by statute, penal servitude not exceeding seven, nor less than three years, or imprisonment with hard labour not exceeding seven years.

(9) 1 Hawkins, 323.

(10) 1 Leach, 365. See also § 956.

(1) Lieutenant S. H., of the 43rd regiment, and Lieutenant J. H. of the

Art. 65—67.
Improper
disclosures,
offence not
complete, unless
effect be pro-
duced.

130. It is sufficient to maintain a charge grounded on the sixty-fifth and sixty-sixth articles to show that the words used have a *tendency* to create alarm or despondency. The offence defined in the sixty-seventh article is not complete unless a certain *effect be produced*; to procure a conviction under it, it is necessary not only to prove the disclosure of the numbers, position, magazines, or preparation of the army, for sieges or movements; but also that, by such mischievous disclosures, *effects* injurious to the army, and the public service, were produced. Though the article designates the disclosures as mischievous, yet it does not contemplate such conduct as an offence, until it create injurious effects, the result alone giving point to the act: without proof of the injurious effects produced by disclosure, a charge under this article must fall to the ground.

Order of the
Duke of
Wellington,
probable origin
of sixty-fifth
and sixty-
seventh articles.

131. It is probable that the sixty-fifth and sixty-seventh articles had their origin in the following order of the Duke of Wellington, dated *Celorico*, 10th August, 1810, or that they originated in the causes which produced it, as the express words of each article are in a great degree discoverable in it. The first part of the order having stated, that some correspondence had been received from the army, which had occasioned considerable alarm at Oporto, afterwards proceeds: "The commander of the forces will not make any enquiry to discover the writer of the letters which have occasioned this unnecessary alarm, in a quarter in which it was most desirable it should not be created. He has frequently lamented the ignorance which has appeared in the opinions communicated in letters written from the army, and the indiscretion with which these letters are published. It is impossible that many of the officers of the army can have a knowledge of facts, to enable them to form opinions of the probable events of the campaign; but their opinions, however erroneous, must, when published, have mischievous effects. The com-

7th Royal Fusiliers, were together arraigned at Moimento de Beira, in June, 1812, for "conduct unbecoming the character of officers in spreading false and injurious reports tending to create alarm and terror among the inhabitants of Espenhal:" Lieutenant J. H. was fully and honourably acquitted; Lieutenant S. H. found guilty.

The sentence was public reprimand.

The sentence on a conviction upon a similar charge must, had the article now under consideration existed, have been cashiering: though, as in the case of Lieutenant S. H., the spreading false reports may not have arisen in malevolence, but with a view "to amuse himself at the expense of the terrors of the people of the country."—G. O. Villa Verde, 2nd July, 1812.

munication of that of which all officers have a knowledge, viz., the numbers and dispositions of the different divisions of the army, and of its magazines, is still more mischievous than the communication of opinions, as must be obvious to those who reflect that the army has been for months in the same position; and it is a fact come to the knowledge of the commander of the forces, that the plans of the enemy have been founded on the information of the description extracted from the English newspapers, which information must have been obtained through private letters from officers of the army. Although difficulties, inseparable from the situation of every army engaged in the operations of the field, particularly in those of a defensive nature, are much aggravated by communications of this description, the commander of the forces only requests that the officers will, for the sake of their own reputations, avoid to give opinions upon which they cannot have a knowledge to enable them to form any, and if they choose to communicate facts to their correspondents, regarding the position of the army, its numbers, formation of the magazines, preparations for breaking bridges, &c., they will urge their correspondents not to publish their letters in the newspapers, until it shall be certain that the publication of the intelligence will not be injurious to the army or the public service.”

Art. 65—67.
Difficulties of an army in the field aggravated by imprudent communications.

132. This order best explains the apparent deviation, in the sixty-seventh article, from ordinary penal enactments, which attach penalty to intention evinced by the result, rather than making it depend on the result itself. Officers, by the order, are not absolutely prohibited from communicating to their correspondents the positions and preparations of the army; they are rather led to reflect on the probable tendency of such proceeding, if persevered in indiscriminately; they are, however, strictly enjoined to urge their correspondents not to publish their letters in the newspapers, until it shall be certain that the publication of the intelligence will not be injurious to the army or the public service. The article of war in unison with the liberality of the order, leaves officers in their discretion to communicate local intelligence from the army, but justly makes them responsible for injurious results arising out of an abuse of this privilege.

Officers may make communications, but must answer for results.

133. To support a charge grounded on the sixty-second article, the best proof is to establish the words charged as

Using words tending to create alarm.

Art. 65—67

Case of Lieut-
Colonel Mullins;

remarks thereon.

Seizing supplies
for the army

used previous to or going into action, and to show their tendency by the effect created; but it may be sufficient, where the effect is not demonstrable, to put in proof the words, the tendency of which the court will judge. This article seems directed to cases similar to that which gave occasion for the third charge exhibited against Lieutenant-Colonel the Honourable Thomas Mullins, in consequence of occurrences before New Orleans, in 1815: viz., “for scandalous conduct, in having said to an officer of his regiment, on 7th January, 1815, when informed the 44th was destined to carry the fascines, &c.; *It is a forlorn hope, and the regiment must be sacrificed*, or words to that effect; such an expression being calculated to dispirit those under his command, to render them discontented with the service allotted to them, demonstrative of the feeling with which he undertook the enterprise, and infamous and disgraceful to the character of a commanding officer of a British regiment.” On which the court found as follows: “that the prisoner, Lieutenant-Colonel Mullins, did use the expressions set forth in third charge, or words to that effect; but the court do find that those words were not used in the sense, with the view, or with the evil intention, or consequences, imputed in the said charge; the court do, therefore, most fully and honourably acquit the prisoner, Lieutenant-Colonel Mullins, of the said charge and all criminality thereon.”² Two remarks naturally present themselves. Under the old articles of war, it would have been difficult to have charged the words, proved to have been used by Lieutenant-Colonel Mullins, in any other way than in that actually set forth; the imputation *scandalous*, as here applied, might perhaps have been modified by the epithet *unofficer-like*. As the offence now declared by the sixty-sixth article did not then exist, premeditated or malicious intention must have been proved before punishment could have ensued, upon the use of any words, however detrimental to the service by their tendency to create alarm or despondency. Under the present articles of war, a sentence of cashiering must inevitably have followed the finding of the court, on the third charge to the extent declared in the sentence.

134. Art. 70.—This article admits of no discrimination

(2) G. O. No. 378. 14th September, 1815.

as to punishment by the court martial; the irregular detention, seizure, or appropriation of supplies proceeding to the army, *contrary to orders issued in that respect*, being proved, the court is required peremptorily to award cashiering; any alleviating circumstances, even amounting to the destitution of a corps or detachment, can only be taken into account by the approving authority. It must be observed, that irregularly detaining or appropriating, unless it be "contrary to the orders issued in that respect," does not amount to the offence contemplated by this article, but may be tried and punished in the discretion of the court as prejudicial to good order and military discipline. This article was introduced in 1829; it appears to have been framed to meet the irregularities referred to in the following general order of the Duke of Wellington, dated Arganil, 20th March, 1811: "The commander of the forces is concerned to hear that some of the regiments, coming up in the rear, have forcibly seized on the supplies, on the march, for those in front, in consequence of which these last have been deprived of them. Those who stopped and seized those supplies should reflect, that it is most easy to supply the troops nearest to the magazine, whilst those nearest the enemy require the supplies with the greatest urgency. It is besides quite irregular, and positively contrary to the orders of this army, for any commanding officer to seize supplies of any description; there is a commissary attached to every part of the army, and there is no individual, much less regiment, for whom some commissary is not obliged to provide. It is necessary that this practice should be avoided in future, otherwise it will become impossible to carry on any regular operation."

Art. 66.
*contrary to
orders;*

order of the
Duke of
Wellington.

135. *Art. 80.*—Drunkenness *on duty under arms* is the only offence contemplated by this article: drunkenness in an officer off duty, or on duty, *not under arms*, is punishable in the *discretion* of the court under the hundred and eighth article.

Drunkenness on
duty under arms.

136. It is held that the offence of being drunk on duty is complete, when an officer or soldier is found drunk, whether under the influence of liquor, opium, or other intoxicating drug or thing.

Drunkenness
how arising.

137. *Art. 83.*—This article which is essential to the high respectability and honourable character of the army, by pro-

Scandalous
conduct.

viding for the removal from it of officers who may be guilty of scandalous behaviour, unbecoming the character of an officer and a gentleman, although not immediately bearing on its discipline, is in its nature widely comprehensive. It is spoken of when referring to the specification necessary in the charge, (§ 411) and will be again noticed when treating of the general rule: *It is sufficient to prove the substance of the issue or charge* (§ 839-42). No offence is within its peremptory provision, which cannot be designated "scandalous," as well as unbecoming the character of an officer and a gentleman, the definition not admitting of separation of its terms.

The peremptory sentence under this article is not imperative on the court, unless the crime described in it, is expressly charged and found.

138. In cases which arose from the now obsolete practice of inserting a statement in the charge of the crime being in breach of some specified article of war, it was held that if a charge should *expressly refer* to this article, a finding which negatived the imputation of scandal, and of conduct unbecoming the character of a gentleman, must necessarily be followed by acquittal, even though the accused were guilty of conduct unbecoming the character of an officer. It does not however follow where charges are framed in its precise language, that conduct not justifying the imputation of scandalous, but which in the opinion of the court may be to the prejudice of good order and military discipline, should go unpunished: the court would still be in a position to take cognizance of the offence according to its nature and degree, but would in this case, *at their discretion*, award a punishment, and *not necessarily* cashiering, which they are imperatively called upon to apply, in every case, where the offence described in the article has been expressly charged and found. Every possible act, which an officer can either commit or omit, to the prejudice of good order and military discipline, in whatever degree, may and must meet its proportionate punishment, when charged as conduct unbecoming an officer, and proved before a court martial;³ but offences against morality and decorum, or the refined feelings of a gentleman, not directly affecting military discipline, to be punished by a court martial, must deserve the epithet, scandalous, and can only be visited by cashiering, and that by virtue of this article.

Misconduct, not subversive of military discipline, can be tried only if within the terms of this article.

Designedly omitting to

139. *Art. 88.*—The offence which is comprehended in the

(3) See cases of Lieut. Dunkin and Capt. Gibbs. (§ 840-42)

first part of this article,—*Through culpable neglect omitting to send a return, &c.*—might have been punished by the old articles of war in the discretion of a court martial. It would appear to be very vague and too general in its terms to entail peremptory punishment by cashiering. Any neglect, even the slightest, without any criminal intention, is to a certain degree culpable; indeed it is difficult to discover why the epithet *culpable* should have been applied at all to *neglect*, or how neglect can arise which is not culpable. An omission may be venial, but not so a neglect.

send return, or
making false
return.

140. To establish a charge under the latter part of this article, it would be necessary to prove, not only that the return was false, but that the officer knowingly made a false return. This offence was punishable peremptorily under the old articles of war by cashiering.⁴

141. To convict under this article it must be shown that the superior officer was authorized, either expressly or by the custom of the service, to call for the return.

142. *Art. 92.*—the second of the three charges upon which an officer is peremptorily punishable under this article—*being concerned in or conniving at*, by any false document, *any fraudulent embezzlement of stores*—also falls under the eighty-fourth article, which authorizes the award of the punishments of penal servitude, fine, imprisonment, &c., or that of cashiering; but as the ninety-second article of war is imperative as to the penalty, a charge couched in its express terms ⁵ *must* be visited by cashiering.⁶

False return
of stores; con-
niving at em-
bezzlement;

143. The same remark applies to the offence which is subjected to the peremptory punishment under the last part of this article, *by producing any false certificates or vouchers or accounts, or in any other way misapplying the public money, for purposes other than those for which it was intended*. It may be observed that the offence here described differs from that within the discretionary, but more penal, provisions of the eighty-fourth article, inasmuch as the misapplication need not be *fraudulent*: a simple misappropriation of *public*

Misapplication
of public money.

(4) Sec. v. Art. 1.

(5) The eighty-fourth article extends not only to connivance by means of *false documents*, but also to connivance in any way by a person in trust.—See § 200.

(6) As this offence is within the

terms of the seventeenth section of the mutiny act, the loss and damage sustained is recoverable, as therein pointed out, the court being in every case required to ascertain the amount, and to declare by their sentence that it shall be made good by the offender.

Art. 92.

money intended for any specific purpose — the discharge of one *bonâ fide* claim with moneys *intended* for another — might subject an officer to the peremptory penalty.

Evading orders
relative to
muster, &c.

144. *Art. 93.*— This article extends to any evasion, by concealment or wilful omission, of the spirit and meaning of the orders and regulations relating, as the article expresses it, to the *foregoing points*. This phrase must be understood to embrace the *points* comprehended by the eighty-eighth and following articles, and may be held to apply to all existing orders, as to returns, to masters, to pay lists, to reports relative to the retirement of officers, to the discharge and pensioning of soldiers, and to returns of stores, and the application of public money.

Neglecting or
refusing
assistance to
civil magistrate,
on application
made.

145. *Art. 100.*— It is supposed that officers may commit a breach of this article, not only when serving in the United Kingdom, and in such British colonies as have a form of British civil judicature in force, but also, since the alteration in the articles of war in 1832, which has been referred to when treating of the jurisdiction of courts martial (§ 78-82) in colonies or possessions, in which, being under British protection, or having become British by conquest or cession, the law of the mother country, from which the first settlers were drawn, or some foreign law, or a modification of such laws, may have been preserved to them, provided only there is any civil judicature in force by the appointment or under the authority of Her Majesty, and that such judicature does not declare its incompetence to take cognizance of crimes and offences committed by officers and soldiers.

Modification
of the article
to meet such
cases abroad

146. The words "*competent to try such offender*" were inserted in the hundred and thirtieth article in the articles of war for 1851,— and not before they were needed. In the previous year, the chief law officer of the crown, in the Mauritius, where French laws remain in force, declared that the *civil* law was incapable of dealing with a murder, committed by a soldier, who subsequently underwent the sentence of death awarded by a general court martial.

and at home.

147. The very important words "on application made to him for that purpose" were added in 1854, and serve to protect officers from a charge of neglect, under this article, and the seventy-sixth section of the mutiny act, for preferring charges for criminal offences before courts martial, when they are punishable under the articles of war. The punishment

prescribed in the mutiny act — disability to have or hold a civil or military office — applies only to conviction on a prosecution for the offence in the courts of record at Westminster, Dublin, or Edinburgh. Art. 93.

148. *Art.* 101. This article will be best understood by a reference to the fourteenth section of mutiny act, which has been progressively modified for the purpose of preventing the Queen being deprived of the services of soldiers, except for some purely criminal matter, or a debt amounting to thirty pounds or upwards.

149. Except on the conviction of the offences specified above (§ 121-22), and except also on conviction of a soldier of habitual drunkenness, courts martial are not required to apply any prescribed punishment. In the case of both officers and soldiers they award, at their discretion, such punishments¹ as accord with the provisions of the mutiny act and articles of war, and with the usage of the service.

DISCRETIONARY
PUNISHMENTS.

150. The punishments for military offences, *applicable to officers*, established by the mutiny act or articles of war, or by the custom of the British army, which courts martial may, in their *discretion*, award on conviction, are :

Applicable to
officers.

In cases specially prescribed (sec. 165),—*Death*, or *Penal Servitude* : ²

Death.

For embezzlement (sec. 200),—*Penal Servitude*,³ and in this case *only*, *Fine* : or,

In the above and all other cases, *Imprisonment* ; ⁴ *Cashiering*, accompanied by a declaration that the prisoner is unfit, or unworthy, or totally unfit and unworthy⁵ to serve in any military capacity : to which has sometimes been added, that the prisoner's sword be broken over his head ; ⁶

Imprisonment.
Cashiering.

(1) The phrase "*such other punishment as by a general court martial shall be awarded*," occurring in the forty-sixth, sixty-second, and hundred and seventh articles, must be understood to be limited by the customs of the service, and the general powers, as to punishment conveyed by the mutiny act, and articles of war.

(2) See note, § 38.

(3) At the date of the last edition of this work this was the only case in which officers were liable to transportation, but the general powers given to general courts martial, both by the

mutiny act (sec. 8) and the articles of war (Art. 118) now extend to them equally with soldiers.

(4) Mut. Act, sec. 8. Art. War, 118, 127.—Neither the mutiny act (sec. 27), nor the articles of war (art. 127, 128) subject officers to imprisonment *with* hard labour, or *with* solitary confinement.

(5) G. O. 24th March, 1808. Sentence on Lieutenant-General White-lock.

(6) G. O. 28th May, 1808. Sentence of court martial on assistant surgeon Thomas Talbot, 1st bat. 60th regiment.

Loss of rank.

Reprimand.

Dismissal.

Forfeiture of decorations.

Discretionary punishments, applicable to non-commissioned officers and soldiers.

Cashiering simply; *Dismissal*; *Loss of Rank* in the army or regimentally, either according to the date of commission of seniority, or both;⁷ and (as a substantive or as an additional punishment), *Reprimand*, which may vary in degree from a public and severe reprimand to private admonition.

151. The distinction between the punishments of cashiering and dismissal, is not invariably observed; but that a marked difference really exists, and ought to be borne in mind by members of courts martial in awarding sentence, may be learnt from the general order promulgating the sentence on Captain Barnes, of the 89th regiment; it is there said: 'His Royal Highness has not considered it expedient to give effect to the recommendation of the court in the prisoner's behalf, further than to mitigate the term of *cashiering* into that of *dismissal from His Majesty's service*."⁸

152. The general terms of the hundred and nineteenth article of war "*any offender*" extend to officers, and authorize their being sentenced to forfeiture of "all field medals and decorations according to the nature of the case."

153. The punishments applicable to non-commissioned officers and soldiers, varying according to the powers of that description of court, before which they may be tried, *all* of them being applicable by a *general* court martial only, are,

Death, in certain cases specially prescribed (§ 165):

154. *Penal Servitude* for a term of not less than four⁹ years for all offences punishable by death (§ 165), and for those comprehended in embezzlement (§ 200): or,

155. In these and all other cases to *Corporal punishment* not exceeding fifty lashes, as provided by the mutiny act and articles of war, but further restricted in its application, by the Queen's regulations,¹ to soldiers of the second class, and, except on actual service in the field, for those offences only, which are therein particularized, awarded either by itself

(7) Art. War, 127. In cases at the discretion of the court and which did not appear to call for the removal of the offender from the service, the suspension of officers from rank and pay for certain periods, as six or twelve months, was commonly resorted to by courts martial prior to 1815, but having been found productive of much incon-

venience to the service, it was in that year forbidden by an article of war similar to the present hundred and twenty-seventh.

(8) G. O. No. 213.

(9) Art. War, 118.

(1) Queen's Reg. p. 227: see § 675-79.

(§ 314), or with the addition of imprisonment; ² *Imprisonment*, with or without hard labour,³ of which any portion or portions, not exceeding fourteen days at a time, or eighty-four days at different times, in any one year, with intervals between them of not less duration than the periods of solitary confinement, may be solitary;⁴ or *Solitary imprisonment* not exceeding fourteen days.⁵

Punishments applicable to soldiers:

156. On conviction for desertion the court, in addition to any other punishment, may order the “*offender*” to be marked with the letter D in the manner prescribed by the mutiny act.⁶

Additional punishment.

Letter D.

157. On conviction of drunkenness on, or for duty or on parade, or on the line of march, or of habitual drunkenness, the special *forfeitures* for those offences elsewhere (§ 206) particularized.

Forfeitures of pay for drunkenness.

158. A *general* court martial, in addition to any other punishment, may sentence any offender to forfeiture of all advantage as to additional pay, good conduct pay, and pension on discharge which might have otherwise accrued from the length of his former service, or to forfeiture of such advantage absolutely, whether it might have accrued from past service, or might accrue from future service, or to forfeiture of the annuity and medal which may have been granted for former meritorious service, or of the gratuity and medal awarded for former good conduct, and of all field medals and decorations, according to the nature of the case.⁷ The same additional punishment may be awarded by district or garrison courts martial on conviction of “disgraceful conduct”⁸ (sec. 231); and a district or garrison court martial may also sentence any soldier convicted of desertion to forfeiture of all advantages as to additional pay, good conduct pay, and pension on discharge which might accrue from *future* service;⁹ and a soldier is liable to the same punishment on conviction of a false confession of desertion.¹

Forfeitures of good conduct pay and decorations.

159. Soldiers, who as a consequence of conviction forfeit one penny a day of their good conduct pay for one year,² may

Forfeiture of good conduct pay.

(2) Mut. Act, secs. 22, 23. Art. War, 120, 121.

(3) Mut. Act, sec. 27.

(4) Art. War, 128, 131.

(5) Art. War, 123.

(6) Mut. Act, sec. 26. See § 798.

(7) Art. War, 119.

(8) Art. War, 85.

(9) Art. War, 52. The forfeiture of all advantage from *former* service is a consequence of conviction, and is not awarded by the court.—Art. War, 171, see § 118.

(1) Art. War, 50.

(2) See before, § 119.

for a first offence of a serious nature be adjudged by the sentence of a court martial, to forfeit all or any portion of the advantages they may have derived from their previous good conduct, either absolutely or for any period, not less than eighteen months, according to the circumstances appearing in evidence.³

Punishments of
non-commissioned officers;

160. A non-commissioned officer may be reduced to the ranks or placed at the bottom of the list of his rank, by the sentence of any court martial,⁴ and, in addition, is subject to any of the above punishments which the court may award to a soldier.

forfeiture of
rewards
for meritorious
services.

161. Any non-commissioned officer so placed or reduced to the ranks by the sentence of a court martial may, by order of the same court, be made to forfeit any gratuity, annuity, and medal, which may have been conferred upon him,⁵ but not otherwise, except on conviction of desertion, or of felony by a court of civil judicature.⁶

Punishment of
warrant officers
by district or
garrison,

162. A warrant officer may be tried by a district or garrison court martial, and may be sentenced to be dismissed from the service, or to be suspended from rank and pay and allowances for any stated period, or to be reduced to the bottom or any other place in the list of the rank which he may hold, or to be reduced to an inferior class of warrant officer, or, if he was originally enlisted as a private soldier and continued in the service until his appointment to be a warrant officer, to be reduced to the rank of a private soldier.⁷

and general
courts martial;

A warrant officer may be sentenced by a general court martial to these and to such other punishments as such court is competent to award.⁷ But the articles of war also provide

proviso by
articles of

(3) Good Conduct Regulations, 10th Sept., 1860, par. 12.

(4) Previous to the year 1833 there was no provision in the articles of war for the reduction of non-commissioned officers by courts martial other than regimental; the power of general courts martial in this respect depended upon custom, as did also the power of courts martial generally to sentence non-commissioned officers to be *suspended* or *degraded*. Non-commissioned officers were not unfrequently sentenced to be *suspended*, for a fixed period, from the rank and pay of non-commissioned officer, and to serve as,

and upon the pay of, a private soldier. Precedents were not wanting, where non-commissioned officers, particularly serjeant-majors and quarter-master serjeants, have been *degraded*, that is, have been sentenced to serve as non-commissioned officers in an inferior rank. Courts martial are no longer authorized to deprive colour serjeants of their badge in case of misconduct. — *Circ. Horse Guards*, 18th Nov., 1860.

(5) Art. War, 137.

(6) Good Conduct Regulations, par.

3. See § 118.

(7) Art. War, 130.

that a warrant officer shall in no case be liable to corporal punishment.⁷ war with respect to them.

163. In addition to any other punishment which the court may award, a court martial may further direct (§ 689) that "any offender" may be put under stoppages in the cases specified in the hundred and thirty-second article of war. ADDITIONAL PUNISHMENTS.
Stoppages.

164. In addition to the punishments which courts martial are empowered to award, or which are consequent on conviction, a general court martial in any case,⁸ and a district or garrison court martial on conviction of desertion⁹ or disgraceful conduct¹ may recommend the offender to be discharged with ignominy, under a regulation elsewhere (§ 692) mentioned ; and may in that case recommend the offender to be marked with the letters B. C.³ Discharge with ignominy.

165. The penalty of *Death* is attached to the following offences, committed either by officers or soldiers: it must however be borne in mind, that the offences declared in the fifty-seventh and three following articles of war are not by the mutiny act³ expressly made liable to this punishment, and therefore a capital sentence cannot by virtue of these articles be awarded, nor can death be mitigated to penal servitude, in the case of any officer, soldier, or other person within the United Kingdom, or the British Isles. The sixty-second article is expressly limited to officers and soldiers "employed in foreign parts," and consequently the penalty of death could not be applied under it, even in the event of foreign invasion or civil war, and the troops being engaged in active operations at home. Crimes punishable by death;

Mut. Act, sec. 15. Treating, or entering into terms with a rebel or enemy, without Her Majesty's licence, or the licence of the general, or chief commander.⁴ whether at home or abroad.

- | | |
|---|---|
| <p>(7) Art. War, 130.
 (8) Art. War, 119.
 (9) Art. War, 52.
 (1) Art. War, 85.
 (2) Mut. Act, sec. 26.
 (3) Mut. Act, sec. 1. Art. War, 190. The articles of war of King James the Second provided that no</p> | <p>punishment extending to loss of life or limb should be inflicted on any offenders in time of peace, although the same were allotted for the said offence by those articles and the laws and customs of war.
 (4) There is not any parallel article of war.</p> |
|---|---|

Crimes punishable by death; whether at home or abroad;

not by the mutiny act at home;

at home or abroad;

in foreign parts only.

Mutiny.

Facts should be set forth in charge.

- Art. 40. Mutiny; sedition; not using utmost endeavours to suppress mutiny or sedition; knowledge of mutiny or intended mutiny, and delaying to inform the commanding officer thereof:^a (§ 166)
41. Striking, using or offering violence against a superior officer, being in the execution of his office;^a or, *being confined in a military prison*, and striking, using or offering violence against a visitor, or other *his superior military officer* being in the execution of his office:^a (§ 167)
42. Disobeying the lawful command of a superior:^a (§ 595)
46. Desertion:^a (§ 175-9)
55. Holding correspondence with, or giving intelligence to the enemy;^a relieving the enemy with money, victuals or ammunition; or knowingly harbouring, or protecting, an enemy:^a (§ 190-6)
56. Misbehaviour before the enemy;^a shamefully abandoning or delivering up any garrison, fortress, post, or guard;^a compelling, or speaking words, or using other means, to induce the abandonment of any garrison, fortress, post, or guard:^a (§ 191)
57. Leaving commanding officer, or post, to go in search of plunder:^a
58. Treacherously making known the watchword:^a
59. Intentionally occasioning false alarms in action, camp, garrison, or quarters:^a (§ 196)
60. Casting away arms or ammunition in presence of an enemy:^a
61. A sentinel sleeping on his post, or leaving it before being regularly relieved:^a
62. *Employed in foreign parts*, and doing violence to any person bringing provisions, or other necessaries, to the quarters of the army; forcing a safeguard; breaking into a house or cellar for plunder:^a (§ 197-9).

166. Art. 40.—Mutiny and sedition are, by some, considered as convertible terms, and perhaps properly so; but by military men, *mutiny* is rather understood to imply extreme insubordination, as individually resisting by force, or collectively rising against or opposing military authority, with or without actual violence, such acts proceeding from alleged or pretended grievances of a military nature: and *sedition* is supposed to apply to acts of a treasonable or riotous nature, directed rather against the government or civil authorities than military superiors, though necessarily involving or resulting in insubordination to the latter. The facts, by which it is intended to substantiate mutiny or sedition, should be set forth in the charge; it must be proved by acts, not by words alone, or by words at all, except in connection with acts, since even traitorous words against Her Majesty are not

(5) Mut. Act, sec. 15.

(6) Not expressly mentioned in the mutiny act.

punishable, as is mutiny, by death.⁷ From the earliest periods Art. 40. of our military history a distinction has been admitted between *mutinous conduct* and *mutiny*; the penalty of death could not legally be awarded on a charge of *mutinous conduct*.⁸ Nothing less than mutiny, expressly charged and satisfactorily proved, will justify the sentence of death. Mutinous conduct implies behaviour tending to mutiny, as murderous conduct implies behaviour tending to murder; and as a man of murderous character may not have effected, or may not have formed the intention to commit that crime, so may a soldier, whose conduct evidently tends to mutiny, yet be clear of the perpetration or completion of that offence.

167. Art. 41.—The article now extends to every sort of violence, which may be used or offered to *superior officers*, Violence to superior, under whatever circumstances they may be *in the execution of their office*. It is held to be the intent and meaning of the mutiny act that, whenever they are answerable to the law for a neglect of duty, the law will extend its protection to them.

168. It is an inseparable part of the offence contemplated in execution of his office. by this article, that the violence be offered to a superior officer *in the execution of his office*. To subject an offender, therefore, to the grave punishments contemplated by it, it is necessary, not only to prove that the violence was offered to the *superior*⁹ *in the execution of his office*, but also, that this circumstance should be specifically alleged in the charge, or, *at the least*, that facts should be set forth, from which it might be collected. The omission of this allegation, in a very

(7) Art. War, 43. See "*Acts and Declarations of Co-mutineers*," § 821-3.

(8) Private J. Midgeley, Royal Fusiliers, having been tried at Malta and sentenced to be transported for fourteen years upon a charge of "highly insubordinate and mutinous conduct" in using threats against the life of a sergeant, and having a firelock loaded with the avowed intention of shooting him, the general commanding in chief wrote as follows to the major-general commanding:—"I have to acquaint you that the sentence awarded by the court and approved by you could not legally be enforced, inasmuch as neither the charges against the prisoner, nor the evidence in support of them,

constitute an offence punishable with death, within the intent and meaning of the mutiny act."—*Horse Guards*, 26th July, 1834.

(9) "I have it in command to say, that a lance corporal is in all situations and under all circumstances while holding the lance rank, to be regarded and denominated as a non-commissioned officer, for the time being, and that his authority as a superior, is, to all intents and purposes, as valid, whilst acting in the capacity as corporal, as if he were a commissioned officer of the regiment."—*Adjutant General*, Horse Guards, 22nd June, 1844.

Art. 41.

aggravated case (§ 406), caused the revision of a sentence and the substitution of corporal for capital punishment.

Execution of
office:

169. There would be some difficulty in accurately defining what is meant by the words *in the execution of his office*, which were not a part of the original provision, and were added in the year 1749. Unquestionably an officer would be in the execution of his office, whether the duty he was performing were a prescribed duty, or a duty arising out of the exigency of the moment. As a familiar illustration of which, it may be observed, that an officer seeing a soldier out of quarters after hours, or improperly dressed in a town, or transgressing against any order or custom of the service, would be in the execution of his duty, and therefore of his office, in ordering the soldier to his barracks, or directing such steps as may be necessary. It would perhaps be going too far to assert, that an officer present with his regiment is perpetually on duty, and consequently in the execution of his office, because it may be imagined that in social intercourse, violence may be offered to a superior, which clearly could not be charged under this article, though it is equally clear that it is the duty of all officers to quell all quarrels, frays and disorders; and consequently, if at the mess-table or in a private room an officer, fulfilling this duty, encountered violence from an inferior, the offender might be exposed to capital punishment, by alleging that the *superior* officer was in the *execution of his office*. Whatever the regulations or customs of the service require in an officer, it is the duty of the officer to perform; and whenever the good of the service requires that he should interfere, it is his duty to interfere: in such cases the officer is in the execution of his office, and entitled to the protection of the law. No officer, of any standing, will be under any difficulty in deciding whether an officer was in the performance of his duty upon any given or assumed occasion. Were an officer in the execution of accidental or *general* duty, he would undoubtedly be in the execution of his office. But if a doubt exist on this point, the offence cannot be deemed capital, but must be visited by punishment under the article "*All crimes not capital*."

when an officer
must be con-
sidered to be
in.

170. It may be observed that to constitute this offence, it must appear that the offender was aware of the rank or superiority of the superior. A case has arisen in which it has

been asked: Can an officer be in the execution of his office in plain clothes? No military man, of any experience and reflection, will hesitate to answer, that an officer may be in the execution of his office in plain clothes. We will assume a case, which has, in our own experience, repeatedly occurred; it may serve to exemplify what it may be desirable to leave no doubt on. We will suppose an officer returning from shooting or boating, of course in any dress but regimentals,—that he encounters a soldier of his regiment or company committing some flagrant breach of good order; it is unquestionably his duty to interfere, and to order that soldier to desist or to retire to his quarters. The soldier knowing his officer and offering him violence, by drawing his side arms on him or by any other means, would expose himself to the capital charge of offering violence to his superior officer in the execution of his office. There is this difference between plain clothes and regimentals; there would be no occasion to establish by proof that the soldier had a knowledge of his officer, such officer being in regimentals; it would be presumed, until the contrary was shown: whereas, were the officer in plain clothes, it would be indispensably necessary to show that the soldier, at the time of offering violence, was aware that it was directed towards his superior officer.¹

Art. 41.
In plain
clothes.

171. The latter part of this article was added in 1846; and it may be remarked that it defines the only offence, committed within the prison, for which soldiers confined in military prisons are liable to be brought to trial by court martial.²

Violence
against visitor
or military
superior by
prisoner
confined in
a military
prison.

172. The violence, which the article provides against, must be directed against a visitor or *other* military officer: other acts of violence are otherwise dealt with, and are not cognizable by military law, as the whole of the officers of the prisons, when practicable, are purposely taken from the retired and pension list, and considered as on a civil establishment.³

The article
does not apply
when the
superior is
not himself
subject to
military law.

173. *Art. 42.*—Some remarks, bearing on the terms of

Disobeying

(1) If a guard were at hand and circumstances admitted delay, it might be better, before interfering, to resort to the guard; which would most certainly be the course adopted by an officer in plain clothes, who might see men, of a different regiment from

that in which he served, committing a disorder.

(2) Circ. Mem., 23rd Nov., 1849.

(3) Reports of Committee on Military Prisons. War Office, 1st Jan., 1847, pp. 10, 25.

lawful
command.

this article will be offered, when considering a defence which pleads, or is grounded on, inevitable necessity (§ 593). The offence contemplated by it appears to be the wilful disobedience of a personal order, or order addressed to an individual: "Neglecting to obey garrison or other orders," is an offence of a less aggravated nature, noticed in the seventy-ninth article.

Desertion
distinguished
from absence
without leave;

174. *Art. 46.* — With respect to desertion, it is to be observed, that an essential and important difference exists between this offence and that of absence without leave, to which also it may be convenient to refer, in this place. Intention is the criterion which distinguishes between them.

defined to be
absence, not
only without
leave, but
also without
intention of
returning,

or such
intention
having been
given up.

175. Desertion is the illegal absence of an officer or soldier from his duty, *without intention of returning*; it may arise,— for example,— either from his wilful departure from the regiment, detachment, or corps to which he belongs, or may have been attached, *without an intention to return*; or from his wilful and continued absence, an *intention of not returning* being evinced, though the departure might have been with leave, as when a soldier deserts on expiration of his pass or furlough, or attributable, in the first instance, to a cause not under the control of the offender, as when taken prisoner by the enemy's advanced parties, and thus separated from his corps. In every case, the absence of an intention or disposition to return (of the *animus revertendi*, as it is called) is the difference, which is essential to, and constitutes, desertion; and this, even though the deserter may have subsequently surrendered himself — which circumstance may indeed weigh in the apportionment of punishment, but cannot countervail against conclusive evidence in support of the charge.

Provision
as to deserters
re-enlisting,

176. The mutiny act provides that any non-commissioned officer or soldier belonging to any regiment or corps, who shall, without having first obtained his discharge, enlist in any other regiment or corps, may be deemed to have deserted, and be liable to be punished accordingly.⁴ The fifty-third article of war contains corresponding clauses, and also makes a provision, which, as amended in 1860, is most practical, that any number of charges of desertion may form the subject of a single arraignment.

and their trial,
when one or
more instances
are discovered.

(4) Mut. Act, sec. 15. Sec § 183.

177. The evidence to support the charge of desertion must always vary: the intention may be proved by direct or circumstantial evidence; it may be inferred or presumed from the length of absence, the prisoner offering no proof to the contrary: in every case, however, proof must be adduced sufficient to lead the court to the conviction that the accused either had no intention of returning or rejoining his corps at the time he absented himself, or at the period when the obstacles to his return might have ceased, or else had given up such intention. It is impossible to lay down any particular time⁵ of absence which may constitute a proof of the intention to desert. Illegal absence for a considerable time is *prima facie* evidence of intention not to return,—and if extending to two months may be proved by the record of the court of enquiry, which (§ 347) is then assembled in the case of a soldier, and, by an exceptional provision in the articles of war, receives evidence on oath;—but it is competent to the party accused in every case to bring in proof acts, or circumstances, implying a contrary intention. On the other hand, absence, for a very considerable time, or however short, if attended by circumstances evincing an intention permanently to abandon, or withdraw from, the regiment or corps, as stepping into a boat, or taking measures to procure the means of crossing a frontier river; or enlisting or offering to enlist, when disguised, in another corps; or embarking for a distant part of the world; or embarking for

Evidence to support charge of desertion.

Time of absence not always a criterion of desertion.

(5) The forty-seventh article of war now contains an *explicit* provision, that soldiers absent without leave for more than twenty-one days, and “*TRIED for desertion*,” as therein directed, may nevertheless be found guilty of *absence without leave*. Except that it *had been* too often misconstrued, it might be difficult to conceive how the article, even as it used to stand, could have been so interpreted. It was *not intended*, most certainly, to define the period, which shall be conclusive proof of desertion, by providing that a regimental court martial should not try a soldier for absence without leave, *if the absence had exceeded twenty-one days*, and by directing that in this case the offender should be tried by a superior tribunal *for desertion*. The question of the

intention of the prisoner to desert or not, is clearly a matter for the determination of the court, judging from the facts before them; and undoubtedly, if they are of opinion that there was *not* an *intention* to desert, they ought then to find the prisoner guilty of being absent without leave, a minor offence necessarily included in the grave charge of desertion.

Justice, no less than sound policy, would seem alike interested to mark this difference, and whilst *awarding* a sufficient, possibly the *same*, punishment, for the breach of discipline in either case, to reserve the penalties inseparable from a conviction of desertion and the disgraceful stigma peculiar to it, for those cases only, where the crime shall be clearly made out.

Desertion:

a neighbouring port; or taking a place in a coach, the offender having no object in view which may tend to account for the dereliction of duty and lead to the belief that a temporary absence only was intended, may amount to satisfactory evidence of the intention to desert.

distance not
invariably
conclusive.

178. Neither can desertion invariably be judged by distance; a soldier may absent himself without leave and depart to a very considerable distance, and yet the evidence of an intention to return may be clear; whereas, he may scarcely quit the camp or barrack-yard, and the evidence of desertion may be complete, as if a soldier were detected in passing through the outposts clandestinely; or crossing a frontier; or taken in disguise, with letters on his person indicating the intention, although he may have gone a few paces only in furtherance of his design. The perpetration of any heinous crime coupled with absence without leave, and the forcible capture of the offender, may, though the absence be of very short duration, and the distance inconsiderable, lead to the belief that the soldier had no intention of returning. The article of war which provides for the punishment of a soldier found more than one mile from the camp, without leave in writing, has no reference whatever to the crime of desertion, except perhaps as it may be intended to obviate facilities of perpetrating it, though some have unaccountably considered it a sort of definition of that offence: the article is, however, of very ancient standing, and appears to have been framed chiefly to prevent marauding, by checking the inclination which soldiers have of straggling at too great distances from camp during the time they may be unemployed, and when they may be lawfully absent.

Prisoner may
be acquitted
of desertion,
and absence
without leave
may be found
where deser-
tion is charged.

179. It is scarcely necessary to remark that the punishments peculiar to desertion cannot be awarded on conviction of *absence without leave*, however aggravated; and that an offender, charged with desertion, may, as specially provided by the forty-seventh article of war, be found guilty of the minor crime, absence without leave, and receive judgment accordingly.

Forfeiture of
former service
inseparable
from conviction
of
desertion.

180. It must be borne in mind, that, as already mentioned (§ 118), a soldier found guilty of desertion, such finding having been confirmed, thereupon forfeits all advantages which might have otherwise accrued from the length of his

former service, in addition to any punishment the court may award; ⁶ and moreover forfeits his regular pay for the day or days during which he may have been absent, which last forfeiture, is alone incurred by soldiers upon conviction of absence without leave. ⁷ These forfeitures are consequent on, and inseparable from, conviction. The moment the sentence is complete by the confirmation of the superior authority, the soldier incurs the penalty which it is not in the discretion of an officer confirming the sentence to remit. Although the forfeitures spring from the finding, yet they do not, under any circumstances, depend in any degree on the sentence. It would therefore be, not only an act of supererogation in a court martial to notice these forfeitures in its sentence, but an impotent and intrusive assumption of jurisdiction.

181. On a first and every subsequent conviction of desertion, courts martial are empowered ⁸ to order that the offender be marked with the letter D. If the court martial does not sentence a deserter to be marked with the letter D., in conformity with the clause of the mutiny act, it is required of the court that a separate letter be appended to their proceedings, stating their reasons and signed by the president. ⁹

182-4. The court may also sentence the deserter to be put under stoppages of pay until he shall have made good any bounty or free kit fraudulently obtained by him by desertion from his corps and enlisting in some other corps or the militia. ¹

185. District or garrison courts martial are empowered to sentence a soldier convicted of desertion to forfeiture of all advantages arising from *future* service, and also to recommend his discharge with ignominy, ² and his being marked with the letters B.C. ³

186. Desertion, however short the period of absence, is not cognizable by a regimental court martial, under any

Desertion.

The court may direct a deserter to be marked with the letter D.;

and to make good bounty fraudulently obtained.

Augmented powers of district courts martial in respect to deserters.

Soldiers illegally absent for

(6) Art. War, 171. The articles of war provide that the court *may* also award the forfeiture of advantages arising from the future service of a deserter. — Art. War, 52.

(7) Art. War, 175. The day on which the soldier *absents* himself, and the day on which he *returns*, are to be counted days for the purpose of the forfeiture, although the absence may not have amounted to an *entire* day

in either case.

(8) Mut. Act, sec. 26.

(9) Queen's Reg., p. 223.

(1) Art. War, 132. The Queen's Regulations (p. 225) direct that in cases of fraudulent re-enlistment, the amount of bounty and of the free kit a soldier may obtain thereby is to be specified in the charge.

(2) Art. War, 52.

(3) Mut. Act, sec. 26.

more than
twenty-one
days tried for
desertion,

circumstances; nor is absence without leave where the absence has exceeded the period of twenty-one days,⁴ without the permission of the officer commanding the brigade district or garrison, but any soldier absenting himself (that is (§ 187) wilfully absent) for a period exceeding twenty-one days, must be tried for desertion, by a general or district or garrison court martial.⁵

but not
unless wilfully
absent beyond
the twenty-one
days.

187. A soldier may be tried for the minor offence of absence without leave, even though he may have been away from his corps for two months, in any case where the circumstances do not indicate an intention to desert, and provided the illegal absence does not exceed the prescribed limits, it having been laid down, on the highest authority,⁶ that "it is not imperative to bring a soldier to trial on a charge of desertion, unless he shall have been illegally absent from his corps for a period exceeding twenty-one days, and that the period of detention in prison cannot be reckoned as a portion of the time he has been *wilfully* and (consequently) illegally absent from his duty." It was pointed out at the same time that the duration of the illegal absence should clearly appear on the face of the charge, and that the following might be considered a model in framing the charge in such a case, viz.: "Having absented himself without leave [*from his commanding officer*]⁷ from the 98th regiment, at ——— on

Form of charge.

(4) In those cases where the soldier may have been committed by a magistrate on suspicion of being a deserter, this period must be calculated up to the day on which he surrendered himself or was apprehended. It rarely happens that legal evidence of that date can be given before a court martial, although the officer who prefers the charge is ordinarily in possession of this information, from the fact of its being mentioned in the route.

It is much to be regretted, that the principle, so advantageously admitted in making the record of the court of enquiry, as to the illegal absence of a soldier, evidence upon his trial for desertion (Art. 170) has not been extended to meet the requirements of this case also, and that the description return, which the justice is required to transmit to the secretary for war, or a copy duly authenticated, should not have been declared to be admissible in evidence, in the absence of proof to

the contrary, of the fact of the apprehension or voluntary surrender, of the date of committal, and as to whether the person committed as a deserter admitted or denied that he belonged to the service.

If any such alteration were introduced, it would become doubly "important for the interest of the" prisoner that the form of return of persons committed on a charge of desertion in the schedule of the mutiny act, should be amended so as not to lead to an admission of "*desertion*" by a prisoner guilty of simple "*illegal absence*," and not alive to the importance of the distinction.

(5) Art. War, 138. See note, § 177.

(6) Extract—Letter, Adjutant General, dated Horse Guards, 10th March, 1840.

(7) The addition of the words [within brackets] is required by the existing regulations.—Queen's Reg., p. 222.

or about the ——— and not returning until brought back on or about the ———, having surrendered himself and been committed as a deserter to the gaol of ——— on the ———.”

188. The fifty-first article of war enables the commander-in-chief, if there are special circumstances to justify the exemption, to dispense, in *any* case, with the trial of a soldier for desertion. A circular of the 18th August, 1860, directs that men, who surrender themselves as deserters, and are retained in the corps in which they happen to be serving, but are not brought to trial, shall be placed in the second class. Before 1841, the trial was *imperative*, after the regimental board (§ 347) had been held to record the illegal absence.

Trial of soldier for desertion may be dispensed with in any case by commander in chief.

189. A recruit having been attested or received pay other than enlisting money,⁸ and deserting before joining his regiment or corps, on being apprehended, and committed for such desertion by any justice of the peace upon the testimony of one or more witnesses upon oath, or upon his own confession, forfeits his personal bounty, and is liable to be transferred to any regiment or corps or depôt nearest to the place where he shall have been apprehended, or to any other regiment or corps to which Her Majesty may deem it more desirable that he should be transferred. But deserters thus transferred are not liable to other punishment for the offence, or to any other penalty except the forfeiture of their personal bounty.⁹

Recruits deserting prior to joining their regiments or corps,

may be transferred.

But liable to no other punishment, except forfeiture of bounty.

190. *Art. 55.*— The latter part of this article, *relieving with money, victuals or ammunition, or knowingly harbouring or protecting an enemy*, is not expressly mentioned in the mutiny act; though no better proof could be required of *holding correspondence with an enemy*,— the offence which is specified in the mutiny act,— than relieving him by money, victuals, or ammunition, or by harbouring or protecting him. The distinction is, however, made in the article of war, and is, therefore, to be noticed here.

Relieving an enemy.

191. *Art. 56.*— This article unites two of the former articles of war; the first paragraph, as it now stands, relates to personal misbehaviour and the shameful abandoning, or delivering up any garrison, fortress, post or guard; the

Misbehaving before the enemy.

(8) Recruits, until they have been attested, or received pay, are not triable by court martial (Mut. Act, sec. 47); but if they abscond under these

circumstances, they are punishable as rogues and vagabonds.—Mut. Act, sec. 47.

(9) Mut. Act, sec. 36.

Art. 56.
Misbehaving
before the
enemy,
not synony-
mous with
cowardice.

second, to compelling or inducing others to misbehave. Misbehaviour before the enemy is generally deemed synonymous with cowardice; but that there is an essential difference, appears from the approved sentence of the court martial on Captain Barnes, of the 2nd battalion, 89th regiment; he was charged "with misbehaving himself before the enemy, in the expedition under the command of Major-General Lord Blaney, in the month of October, 1810," upon which charge the court "was of opinion, that the prisoner was so far guilty of misbehaving before the enemy, inasmuch as he was not with his company at the moment of the general retreat; but in consequence of the good conduct of the prisoner, previous to the retreat, the court did not find him guilty of personal cowardice. The court, therefore, sentenced him to be *cashiered*, but at the same time humbly presumed to recommend him as an object of clemency to His Royal Highness the Prince Regent."¹ That the slightest shadow of cowardice could not attach to the absence of Captain Barnes, highly culpable as it appears, from the sentence, to have been, is evident from the recommendations of the court, the mitigation² by the Prince Regent of the sentence awarded him, and his subsequent restoration to his rank in the 44th regiment.

Shamefully
abandoning
a post;

192. The term "shamefully abandon," perhaps requires some elucidation. The broad and general maxim is, and ever has been, that a post must be defended to the last extremity, and that so long as any expedient remains unattempted, or any rational hope of defence exists, it is criminal to abandon or deliver it up; and that to surrender a post, when not justified by necessity, is shamefully to abandon or deliver it up. But what is the last extremity? When does that inevitable necessity arise which amounts to a justification? There are no orders in the British service, not obsolete, which can be referred to in replying to these questions. The abandonment of a post in the field can only be judged by the particular attendant circumstances; but with respect to places of strength, there

(1) G. O. No. 213.

(2) See § 151. — It may be remarked, as to this sentence, which was approved by the Prince Regent, that a recommendation to mercy is included in the sentence, which was awarded in

the *discretion* of the court; but it must be remembered that His Majesty's pleasure, as to the inexpediency of such proceeding, had not then been made known.

are some fixed principles which may guide the judgment. Art. 56.
 Mr. Samuel, in treating of the offence of abandoning a post,³ refers to the articles of war for the parliamentary army, under the Earl of Essex, which he considers, and this must be admitted, as admirably calculated, so far as they go, to elucidate the subject. The third article declares: "If any town, castle, or fort, be yielded up without the *utmost necessity*, the governor thereof shall be punished with death. And withal to *know in what case* and circumstances a governor and the militia of the garrison may be blameless for the surrendering of a town, castle, or fort, it is hereby expressly signified, that, *first*, they are to *prove* the *extremity* of want within the place, inasmuch that no *eatable* provision was left there for sustenance of their lives; *secondly*, that no succour or relief, in any probable wise, could be hoped for; *thirdly*, that nothing else could be expected, but that within a short time, the town, castle, or fort, with all the garrison, and arms, and ammunition, magazines and appurtenances belonging to it, must of *necessity* fall into the hands of the enemy. Upon proof of which forementioned circumstances, they may be *acquitted* in a council of war, else to be liable to the punishment above expressed."

193. Mr. Samuel quotes the treatise of the learned Dr. Sutcliffe, and adds, that the surrender of a place cannot be justified, without "a previous consultation among the principal officers, as to the possibility of the further maintenance of the place." It rather accords with military ideas in the present day, that an officer in command should act independent of others; but his conduct, to be justified, must necessarily be supported by the opinions of the principal officers present. It is inseparable from an active and energetic defence, that a governor should be in constant and unrestricted communication with the superior officers of the garrison, the commanding artillery and engineer officers and other heads of departments; a formal consultation, therefore, in desperate cases, can be expected to add little to the system of defence, and in fact has seldom been resorted to, but (as is usually the object of councils of war) to furnish an excuse for the execution of a predetermined plan of an unfortunate

whether
previous
consultation
is necessary.

(3) *Law Military* (1816), p. 606. *The Practice and Lawes of Armes*, by Matthew Sutcliffe. 1593.

Art. 56.

Abandoning a post.

and unpopular tendency. In the French service, a governor besieged is authorized to form a *conseil de défense*,⁴ composed of the heads of departments; and this measure, if resorted to at the commencement or during the progress of the siege, and not to justify capitulation, seems preferable to, or perhaps less objectionable than, any other form of a council of war; particularly if, as in the *conseil de défense*, the opinion of each individual, on any proposed question, be *separately* and minutely recorded. The great objection to a *council of war*, which increases with the number of which it may be composed, is, that the individuals may be led to shelter themselves, under the aggregate opinion, for any concurrence in an unfavourable measure which they may express, knowing that the chief honour, as well as the principal responsibility attending the result of a desperate or critical measure, must attach to the authority convoking the council.

Rule in the French service.

194. The ordinances of Lewis the Fourteenth, adopted by each form of government which has subsequently wielded the power of France, succinctly but energetically declare the necessity which can alone reconcile with honour the surrender of a place: "Tout commandant de place forte ou bastionnée, qui la rendra à l'ennemi avant qu'il y ait brèche accessible, et praticable au corps de la dite place, et avant que le corps de place ait soutenu au moins un assaut, si toutefois il y a un retranchement intérieur derrière la brèche, sera puni de mort, à moins qu'il ne manque de munitions ou de vivres."⁵

Meaning of word "post."

195. As to the use of the word *post*, in this and other articles, it may be observed, that, in this place, it has reference to some point or position, whether fortified or not, which a detachment may be ordered to occupy, or which it may be its duty to defend: in the fifty-seventh article it has

(4) Décret Impérial, 24 Décembre, 1811.

(5) The following extract from a very valuable work, by Colonel Jones, of the engineers, printed for private circulation, relative to the lines thrown up to cover Lisbon in 1810, shows the very happy adoption of a council of defence, which perhaps derived its value and importance from the special provision made for its guidance: "The garrison of Abrantes was composed altogether of troops in the service of

Portugal, commanded by a Portuguese governor. The only British in the place were the engineers, the senior of whom, Captain Fatton (the officer who had constructed the defences) being a man of peculiar gallantry and firmness, was, by order of Lord Wellington, made one of a council of defence, and any proposition for surrender was forbidden to be tendered or received without his name being signed in approval of the measure."

an indefinite signification, but with a general reference to the position or place which it may be the duty of an individual officer or soldier to be in, more especially when under arms; in the sixty-first article, the re-insertion of "sentinel," has rendered it still more clear than before that *post* applies to the spot, on which a sentry stands when, on coming on duty, he receives his orders; or on which he is placed, when the officer, or non-commissioned officer posting him, leaves him to the observance of his duties; in this sense, it is used in the general orders of the army, when it is said, that "sentinels are not to walk more than ten yards on each side of their posts." The word *post* may also apply to the whole extent of ground specially pointed out as the limits of the walk of a sentry.

196. *Art. 59.*—The penalty of death is not applicable, under the provisions of the mutiny act, to this offence, within the United Kingdom or the British Isles. It is similar to the seventy-fifth article, which is restricted to the United Kingdom and British Isles, except that false alarms *in action* are now provided for by it, as well as false alarms in camp, garrison, or quarters. The word *intentionally* was introduced into this article in 1830, the effect of which may be to throw the proof of intention on the prosecutor; whereas, before the insertion of this word,—as still under the seventy-fifth article,—it might have been sufficient to prove the fact, and connect the accused with the effect as charged, leaving him to exonerate himself from culpable intention, if possible.

Art. 59.
Intentionally
occasioning
false alarms.

197. *Art. 62.*—This article is operative only when an army is "employed in foreign parts."—It is obvious that under those circumstances there would then be greater occasion to repress a tendency to violence on the part of the troops, than when employed among their own countrymen.

Art. 62.
In foreign
parts only.

198. A question has been raised as to the precise meaning of the words in this article—"shall do violence to any person bringing provisions or other necessities to the quarters of our forces." Mr. Samuel enters upon a long discussion on the words, "*shall do violence to any person*," and enumerates, as embraced by them, a vast number of offences, which in the eye of the law amount to *personal* violence, from homicide to forcible extortion from the person. Others extend their operation to all possible acts of violence, whether as affecting

Art. 62.
Violence
to bring
of provisions.

Art. 62.

the *person* or the *property* of the bringer of provisions. It is probable that the words, "shall do violence," apply to any act which, at common law, would amount to robbery from the person, or to any assault with intent to rob or to commit felony. In the conflict of opinions, it is very happy that a court martial is *now* empowered to apportion punishment to the degree of guilt of which an offender may be convicted; previous to the revision of the articles of war, the punishment of death was peremptorily enjoined, without any discretionary power in the court.

Forcing a
safeguard.

199. The phrase, "shall force a safeguard," also in the sixty-second article, has sometimes been unaccountably misunderstood; the word *safeguard* has been erroneously supposed synonymous with *sentinel*. It never can be imagined that an offence, which up to the publication of the articles of war of 1829 was punishable, without alternative, by death, could be perpetrated by forcing an ordinary sentry, a crime of a very grave character, but, in its nature, widely different from this offence, which, besides being a contemptuous violation of supreme authority, may bring in question the good faith of a general in chief. By the laws of nations, a *safeguard* or *safeguard* has ever been respected, and the violation resented with the keenest jealousy, more so even than the infraction of a flag of truce. Quotations may be multiplied, both from the orders of British and foreign generals, to illustrate the view now taken of the term *safeguard*; but an order of the Duke of Wellington, dated, Pombeira, 18th March, 1811, will suffice to prove that, in the present day, *safeguard* has a meaning distinct and different from that of sentinel or ordinary guard, though perhaps in His Grace's order it is used in a more extended sense than had generally been applied to it previously: "The commander of the forces requests the general officers commanding divisions will place safeguards in the villages in the neighbourhood of their encampments, to prevent the soldiers from carrying off the furniture, poles of the vines, and other property of the inhabitants. The commander of the forces desires that, at the same time with this order, the articles of war, regarding forcing safeguards, may be read to the troops."

Order of the
Duke of
Wellington.

200. The only offences for which penal servitude can be awarded, except for capital crimes, are those declared in the following article:—

Offences punishable by penal servitude.

Art. 84.—Any officer or soldier, or other person employed in the war department, or in any way concerned in the care or distribution of any money, provisions, forage, arms, ammunition, clothing, or other stores belonging to the army, or for Her Majesty's use—embezzling, fraudulently misapplying, wilfully damaging, stealing—or receiving the same, knowing them to have been stolen—or being concerned therein, or conniving thereat.

The sentence of a general court martial on a conviction under this article, is restricted to the provisions of the seventeenth section of the mutiny act, which authorizes a sentence of penal servitude for any term not less than four years, or of fine, imprisonment, dismissal from Her Majesty's service, reduction to the ranks if a warrant¹ or non-commissioned officer. The act also directs that every such offender shall, in addition to any other punishment, make good at his own expense the loss and damage sustained,—and in every case the court is required to ascertain by evidence the amount of such loss or damage, and to declare by their sentence that such amount shall be made good by the offender. The loss and damage so ascertained becomes a debt to Her Majesty, and may be recovered in any of the courts at Westminster or in Dublin, or the court of exchequer in Scotland, or in any court in the colonies where the person sentenced by the court martial shall be resident, after the said judgment shall be confirmed and made known, or the offender, if he shall remain in the service, may be put under stoppages not exceeding one half of his pay and allowances until the amount so ascertained shall be recovered.

Amount embezzled to be ascertained by court martial, and may be recovered in civil court;

or by stoppages.

201. It is not competent to a court martial to award imprisonment till such amount be paid.² Its duty is to ascertain the loss or damage, and to declare that the offender shall make good the amount. Any imprisonment awarded by the court must be for a definite period; and any fine imposed must be with a view to punishment, and perfectly independent of the amount embezzled.

Imprisonment to be for a fixed time; fine, imposed as punishment, not to cover amount embezzled.

(1) See the limitation as to warrant officers provided by the articles of war, § 162.

(2) G. O. No. 299. Sentence of court martial on paymaster W. Maxwell, Leeds Recruiting District.

Soldiers punishable by district or garrison court martial as for disgraceful conduct.

Officers in certain cases necessarily cashiered.

Soldiers triable by general court martial for disgraceful conduct.

Perforating government property or stores, punishable on a charge of disgraceful conduct.

Forfeitures for drunkenness.

to the extent of three pence a day, and no more,

or of ration of liquor.

202. The article renders a soldier tried by a district or garrison court martial, for the offences declared by it, without any exception, liable to the punishments attached to disgraceful conduct.

203. It must also be observed that in cases which fall under the ninety-second article, as already observed under that article (§ 142-3) the court is peremptorily required to sentence officers to be cashiered.

204. Soldiers are liable to be arraigned before a general court martial on a charge of disgraceful conduct under the ninety-second article, for being concerned in or conniving at embezzlement of stores by any false document.

205. Soldiers, although not concerned in the care or distribution of government money or property, which is essential to the offences contemplated by the eighty-fourth article, who may steal or embezzle the same, or receive them knowing them to have been stolen or embezzled, by the restoration of an old provision in the articles of war of the present year,³ are liable to be tried by a general, district, or garrison court martial on a charge of disgraceful conduct.

206. The articles of war provide *special* forfeitures⁴ in addition to any other punishments, which the court is competent to award for the following offences:—

Art. 80. Drunkenness on duty under arms: (§ 207)

77. Drunkenness on any duty not under arms, or for duty or on parade, or on the line of march: (§ 208)

78. Habitual drunkenness (§ 210-225).

It is provided by the eighty-second article that “in no case shall any soldier by reason of being drunk on or for duty or parade, or on the line of march, or by reason of habitual drunkenness, be at any one time placed under forfeitures of pay, exceeding in the whole the amount of three pence *per diem*;” and that if he shall be at or removed to a station where liquor is issued in kind, or shall be embarked on board of any vessel where liquor is provided as a part of the ration, such soldier shall be deprived of his liquor, instead of forfeiting one penny a day of his pay, for so long a time as his sentence to forfeiture of pay shall continue in force.

(3) Art. War, 85.

(4) A general court martial may sentence any offender to the forfeiture of the advantages accruing from his

service, either past, or future also: district or garrison courts martial only for desertion or disgraceful conduct.— See before, § 158.

207. *Art. 80.*—A soldier for this offence may be sentenced by any court martial to be deprived of a penny a day of his pay for any period not exceeding sixty days in addition to any other punishment which the court is competent to award.

Drunkenness on duty under arms.

208. *Art. 81.*—A similar forfeiture may be awarded under this article, but in this case for a period not exceeding thirty days.

Drunkenness not on duty.

209. It may be observed that the words “on the line of march” in this and the following article must be strictly construed: for instance, they do not extend to drunkenness in billets after the day’s march is over.

“Drunk on the line of march.”

210. *Art. 82.*—The article, now the eighty-second, first appeared in the year 1830. As now revised and rearranged it provides that any soldier, who shall have been drunk four times within three hundred and sixty-five days; or twice drunk when on or for duty or on parade, or on the line of march, may in all cases be charged with *habitual drunkenness*, and shall on conviction be deprived of one penny^a a day of his pay, for any period not exceeding one hundred and sixty-eight days (six months), if convicted before a regimental or detachment court martial, and for any period not less than one hundred and sixty-eight days, and not exceeding six hundred and seventy-two days (two years), if convicted by a general, district, or garrison court martial.

Habitual drunkenness;

definition of,

specific punishment for;

211. It may be observed that it is imperative to award the forfeiture, but that its duration, within the assigned limits, is at the discretion of the court. In addition to any such deprivation of pay, the court may (if it shall think fit) sentence an offender convicted of habitual drunkenness to any other punishment the court may be competent to award—such award of any further punishment being at the discretion of the court.

imperative on the court, who may

award it as a substantive punishment.

212. Any soldier, who at any time within one hundred and sixty-eight days after a conviction for habitual drunkenness, shall be drunk twice, or shall be once drunk when on for duty or on parade, or on the line of march, and shall on

What constitutes a case of habitual drunkenness within six months of a previous conviction;

(5) When the offender belongs to the Ceylon Rifles, Gold Coast Artillery, or the Malta Fencibles, in which corps soldiers receive good conduct pay at half the rates prescribed for the regular army (*Good Conduct Regulations*, par. 18), courts martial, under au-

thority of the secretary at war (*War Office, 7th September, 1844*), and taking into consideration the lower rates of pay in those corps, are in the practice of deviating from the letter of the article, and awarding forfeitures at the rate of one half-penny a day.

how punished.

The court must not omit to sentence the prisoner to be deprived of pay.

Terms of the sentence must be absolute.

Charge of habitual drunkenness not to be appended as a rider to a charge of a different nature, and must be founded on a recent act of drunkenness.

proof thereof be again convicted of habitual drunkenness, shall, over and above any former forfeiture or forfeitures of pay, be liable to the same forfeitures and punishments as on a first conviction, according as he may be tried before a regimental or detachment court martial, or before a district or garrison court martial.⁶

213. As the law imperatively directs a forfeiture for habitual drunkenness, it can only be omitted in those cases where the court, by evidence recorded on the proceedings, has ascertained that the prisoner is already under forfeitures amounting to three pence a day, exceeding which amount no soldier can at any one time be *placed under forfeitures of pay*.⁷

214. In framing the sentence for habitual drunkenness, the terms of this article require that the offender be deprived of *one penny a day of his pay*—the operation of the forfeiture (§ 796) being regulated by the article itself, for the period of the sentence.

215. This article also provides that if a charge of drunkenness on duty under arms, or of drunkenness when on or for duty or on parade, or on the line of march (§ 207-8), be included in a charge of habitual drunkenness, the court shall not pass any sentence of deprivation of pay in respect of such charge of drunkenness whether on duty or for duty, or on parade, or on the line of march, but such deprivation shall be in respect of habitual drunkenness only.

216. A prisoner may obviously (§ 401) be tried on several charges, of which habitual drunkenness may form one, but it is not admissible to append habitual drunkenness as an additional count to a charge of a different nature, nor would it be proper to charge a soldier with habitual drunkenness except in connection with a recent offence, for which he might be in confinement, and which had never previously been made the subject of investigation. If a soldier, charged with a recent act of drunkenness, and also with habitual drunkenness, in having been drunk at the various times set forth in the crime, be acquitted of *immediate* offence, the *collective* or *cumulated* offence cannot be proceeded with; and though, in the course of the prosecution, evidence may have

(6) A *general* court martial is not specified in the latter part of the article providing for a second trial within six months.

(7) See before, § 206.

been given of the prisoner's having been drunk the number of times necessary to constitute, if in connection with a recent act, habitual drunkenness, yet the charge must fall to the ground. A man cannot be said to be guilty of a habit which he has forsaken, however recently; the only proof of an existing habit must be by showing that he is addicted to it at the time of, or immediately preceding, the date of the charge. This view of the case is confirmed by the following extract from a letter of the judge advocate general: "The charge of habitual drunkenness, in all cases, is supposed to be founded upon some recent act of drunkenness, of which evidence must be given, and which has never been enquired into before."^s

217. It had been previously held, and in 1845 a provision was introduced into the article to the effect, that no instance of drunkenness, which had on a former occasion formed part of a charge of habitual drunkenness, should be again adduced against a soldier; but a very important change has been made in the law in this respect, by an addition to this provision, in the year 1849, so that the article now only prohibits those instances being brought forward which have formed part of a charge of habitual drunkenness "*of which a soldier has been convicted.*" This exception, it may be observed, applies in every case of *conviction*, and without reference to whether the sentence shall have been inflicted or remitted by the confirming authority. This does not apply to instances of drunkenness, which have been the subject of a former charge, other than for habitual drunkenness, which may be inserted as instances in a charge for habitual drunkenness, when the offender has been convicted of them.

Instances of drunkenness enquired into on one trial for habitual drunkenness may be brought forward again unless the soldier was convicted,

but not so, if formerly the subject of any other charge.

218. All questions as to the form of charges has been set at rest, his grace the late commander in chief having been "pleased, on the recommendation of the judge advocate general, to direct that the *time, place*, and occasion when each instance of drunkenness occurred should be distinctly specified in such charges; and if the instances of drunkenness on which it is proposed to proceed against a prisoner shall have taken place within six months of a former conviction

Directions of the Duke of Wellington as to form of charge.

of habitual drunkenness, the time [and place⁹] of the said conviction should also be distinctly stated.”¹ His grace further directed a circular memorandum, dated, Horse Guards, 31st December, 1850, that the last instance of drunkenness—or that which may have induced the commanding officer to bring the delinquent to trial—should, in all cases, be specifically charged against the prisoner. Four forms of charges which had been framed to meet every variety of case, and which are given in the note,² were promulgated at the same time.

Questions as to
framing
charges of
habitual
drunkenness,

219. It sometimes happens that a soldier has been drunk, within the limited period, oftener than the number of times necessary to constitute “habitual drunkenness;” it is then better to include in the charge each act of drunkenness, with the necessary specification of time, place, and occasion. The question has been mooted: As the article of war defines “habitual drunkenness,” on a first conviction, to consist in being drunk four times, or twice on or for duty or parade, or on the line of march, within twelve months, can a charge for the offence be maintained by proving that a

(9) It may be observed that, in the forms of charges since authorized by his grace, there is no mention of the place of former conviction.—See second and fourth cases.—§ 218 (2).

(1) Circ. Mem., Horse Guards, 2nd Aug., 1847.

First case.

(2) “For having been drunk on duty under arms (or as the case may be) at Winchester, on or about the 10th day of December, 1850,—this being the fourth (or as the case may be) time of his having been drunk within twelve calendar months, and thereby constituting the crime of habitual drunkenness;—the other instances being as follow, viz. :—

On the 24th January, 1850—drunk at tattoo in Liverpool.

On the 30th March, 1850—drunk in barracks at Weedon.

On the 1st October, 1850—drunk in the streets at Winchester.

Second case.

“For having been drunk in barracks (or as the case may be) at Winchester, on or about the 15th day of May, 1851,—this being the second time of his having been drunk since the 12th of December, 1850, on which day he was duly convicted of habitual drunk-

eness; and thereby again constituting the crime of habitual drunkenness,—the other instance having occurred on the 17th of March, 1851, when he was drunk in the streets (or as the case may be) at Winchester.

“For having been drunk on the line of march from Andover to Winchester on or about the 10th day of December, 1850 (or on or for duty or parade as the case may be) and on parade at Weedon (or on or for duty or on the line of march as the case may be) on or about the 16th of March, 1850,—this being once drunk on parade and once on the line of march within twelve calendar months, and thereby constituting the crime of habitual drunkenness.

Third case.

“For having been drunk on duty under arms at Winchester on or about the 15th day of May, 1851 (or on or for parade or on the line of march as the case may be) within six calendar months of the 12th day of December, 1850, on which day he was duly convicted of habitual drunkenness, and thereby again constituting the crime of habitual drunkenness.”

Fourth case.

soldier has been drunk twice off duty and once on guard?—that is, by reckoning drunkenness once on duty as equivalent to twice off. It is imagined that the charge cannot be maintained by thus compounding offences; the article, in this respect, is sufficiently clear and explicit in the definition of the offence; to its obvious and literal meaning, therefore, are we to adhere. Again, it has been asked with reference to habitual drunkenness: Is a soldier on duty when on fatigue?³ There can be little hazard in replying to this enquiry, that a soldier on fatigue is decidedly on duty, and it may be on very important duty too—the employment of artillerymen in magazines for instance, and the conveyance of provision or ammunition to guards and detachments; but it is believed that to bring a soldier drunk on fatigue fairly within the aggravated penalties for being drunk on duty, he should either have been previously warned for fatigue, or have been regularly taken in his turn or from parade, or have become drunk when on the duty, as otherwise it would be scarcely right to take a man from his quarters and then to visit him with the penalties of drunkenness on duty, on detecting the effects of liquor which he had obtained previous to his having been called on for fatigue.

What constitutes drunk for duty?

220. It is not considered imperative on a commanding officer to bring a soldier to trial for *habitual drunkenness*, as soon as he has completed the number of separate offences necessary to constitute this crime, but it has been left to his discretion to be guided by circumstances, as well regarding the individual as the corps.

The trial of habitual drunkenness is discretionary.

221. This article establishes a description of proof both of a former conviction of drunkenness which may be stated in a charge of habitual drunkenness, and of any instance of drunkenness, which may be adduced in support of a charge, which is peculiar to trials for this offence and could not be admitted in other cases.

Peculiarity of proof admitted under this article.

222. A former conviction of this offence “must,” to the exclusion of parole evidence, be proved by the production either of the court martial book, or of the regimental or company’s defaulters’ book, containing an entry thereof, or

Proof of a former conviction how necessarily proved.

(3) See the Queen’s Regulations, p. 1, where “general courts martial and duties without arms or of fatigue” are specified as the eighth in the detail of duties.

if such book cannot be produced, then by a copy of the entry in one or other of them duly authenticated.

Proof of the instances of drunkenness.

223. All the instances of drunkenness set forth in the charge (§ 217) other than that which occurred last are to be proved by reference to the defaulters' book,⁴ or by satisfactory evidence of the entries therein.

The single instance which is last in the order of time may be punished as a substantive offence.

224. The article now distinctly provides that "if the instance of drunkenness which occurred last should be proved, but the offence of habitual drunkenness should not be proved, the court may acquit the prisoner upon the charge for habitual drunkenness, and find him guilty upon the⁵ single instance of drunkenness, and sentence him accordingly."

Conviction subjects offender to be passed into second class.

225. A conviction of "habitual drunkenness," renders a soldier liable to be degraded from the first to the second class.⁶

Offender may be reinstated in former rate of pay, but not sooner than six months.

226. In cases of habitual drunkenness, "the commanding officer of the regiment may, on the offender's subsequent good conduct, reinstate him in the receipt of any former rate of daily pay, but not sooner than six months from the date of conviction, and in no case will any part of the arrears actually forfeited to the public be restored:"⁷ but this finance regulation cannot be held to authorize commanding officers of regiments to reinstate soldiers in the receipt of pay whilst serving under the orders of the superior officer who may have approved the sentence of the court martial by which the forfeiture for habitual drunkenness was awarded, without reference to such superior authority. The general regulations are explicit on this head: "In case of district courts martial, the commanding officer may, if he should see reason, *recommend* a partial remission of punishment to the general officer who approved the sentence. In the case of regimental courts martial approved by himself, he has the power of using his own discretion."⁸

When commanding officers may not, in their own discretion, reinstate habitual drunkards in receipt of former pay.

Enlarged powers of

227. It has been already mentioned (§ 158) that certain

(4) The substitution of "defaulters' books" for "defaulters' book" obviated any doubt as to whether both the regimental and the company defaulter book are equally available for this reference.

(5) Under ordinary circumstances, the regulations do not sanction a "sim-

ple act of drunkenness" being brought before a court martial.—Queen's Reg., p. 222.

(6) Circular—Horse Guards, 31st May, 1861.

(7) Circular, No. 658.—War Office, 24th March, 1830.

(8) Queen's Reg., p. 225.

offences, when charged as "disgraceful conduct" are punishable at the discretion of a district court martial by forfeiture of service (§ 164), and, if the court in respect thereof shall have made the forfeiture⁹ of all claim to pension on discharge a part of the sentence passed on such soldier, that the court may further *recommend* that he be discharged with ignominy from Her Majesty's service. The offences are specified in the articles of war under the two heads of "disgraceful conduct" and "false returns," but this classification in no way affects the powers as regulated by the articles of war of district or garrison courts martial, in respect to the recommendation of discharge with ignominy, or the award of forfeiture of service, as, by the provisions of the articles of war, the same punishments are attached to the offences included under both heads.

district courts martial on conviction of charges for disgraceful conduct.

228. The term "disgraceful conduct" having been employed in framing charges in many instances, in relation to offences not contemplated in the articles of war, as liable to the penal consequences of offences coming under that designation, and *it being evident that the indiscriminate use of the term tends to weaken its moral effect*, the commander in chief in a circular memorandum¹ desired that, unless a case fairly come under one or other of the legal descriptions specified in the articles of war, it should not be characterized as such in the charge.

The term "disgraceful conduct" not to be applied to other unsoldierlike conduct or neglect of duty, but only to offences so designated in the articles of war.

229. Whatever may be the fact or facts on which the imputation of disgraceful conduct is founded, they should be clearly set forth in the charge.²

The facts must be specified.

230. A soldier tried upon certain facts under the term of disgraceful conduct may be acquitted of the imputation, and found guilty of the facts charged, or some of them, which, if clearly amounting to any offence within the jurisdiction of the court, may be visited by the corresponding punishment.³

An offender may be acquitted of disgraceful conduct and punished for the offence found by the court.

(9) It may be observed that this award of forfeiture of pension is necessary, even where it may appear from the evidence of previous convictions that the offender has been already subjected to this forfeiture. A former forfeiture may have been reversed, or remitted, or the restoration to the benefit of service may have been approved by the Queen, and it does not follow that the superior authority will

in all cases give effect to the recommendation of the court. The forfeiture of additional pay, &c., must invariably form part of the sentence, in these, no less than other cases, where the forfeiture of pension is awarded.—See § 691.

(1) Dated, Horse Guards, 19th November, 1849.

(2) See § 238, 412.

(3) See § 137, 138, 839.

231. The offences, which may be charged and punished as disgraceful conduct, are the following:

Art. 83. Embezzlement, &c.⁴

85. I. Malingering: *wilfully* doing any act, or *wilfully* disobeying any orders, *thereby* producing or aggravating disease, or delaying cure: (§ 232)
 - II. Wilfully maiming or mutilating himself or another soldier, with *intent* (§ 233) to render himself (§ 232) or such other soldier (§ 234) unfit for the service:
 - III. Tampering with eyes, with *intent* to render himself unfit for the service:
 - IV. Stealing money or goods the property of a comrade, &c.; or knowingly receiving the same when stolen: (§ 235)
 - V. Stealing or embezzling government property or stores, or receiving them knowing them to have been stolen: (§ 205)
 - VI. Committing any offence of a felonious or fraudulent nature: (§ 236)
 - VII. Any *other* disgraceful conduct, being of a cruel, indecent, or unnatural kind (§ 237-9).
91. Making or being privy to any false entry, alteration or erasure in any account, description book or document, whereby the real services, &c., or sentence of courts martial upon, any person shall not be given, or withholding facts relating thereto:
 92. *Intentionally* making false returns, &c.; by *false document* conniving at embezzlement; by producing false vouchers, or in any other way misapplying public money: (§ 142)
 93. By concealment or wilful omission attempting to evade the true spirit and meaning of, or orders and regulations relating to, the foregoing points (§ 144).

Malingering;
wilfully pro-
ducing or
aggravating
disease, or
delaying cure.

Effect of
article
as formerly
worded

232. *Art. 83.* — The nature of the offence contemplated in the clause of the article, as amended in 1849, is placed beyond doubt: the act, whatever it may have been, or the disobedience of orders, must appear, not only to have been *wilful*, but also to have produced or aggravated disease or infirmity, or delayed cure. Merely looking at the letter of the article, as it previously stood, a soldier, although no ill-consequences to his health were either intended or ensued, was subject to be tried for disgraceful conduct in "absenting himself from hospital while under medical treatment," an irregularity, which, however necessary to restrain by punishment, neither his comrades nor the officers who might

(4) See before, § 202. An offender, convicted before a district or garrison court martial, is rendered liable to the punishments attached to disgraceful conduct by the terms of the article.

have been called on to sit on his trial, would of themselves have thus characterized. Under the operation of the alteration, here adverted to, a soldier who has *wilfully* produced or aggravated disease or delayed his cure may, as before, be convicted of disgraceful conduct, and, as is only equitable, also be in every case deprived of all claim to pension, in the event of discharge either at the recommendation of the court with ignominy or otherwise for disabilities arising from his own wilful misconduct. On the other hand the offence of simply breaking out of hospital and similar breaches of discipline must be otherwise dealt with, and when tried by court martial cannot be subjected to any special penalties. With reference to the next clause of this article, so far as it relates to self-mutilation, the eighty-sixth article, instead of the trial before a court martial which had previously been imperative, now provides that any soldier, whether on or off duty, who shall become maimed or mutilated or injured, except by wounds received in action, shall be forthwith brought before a court of enquiry; which shall report their opinion whether such maiming or mutilating or injuring was occasioned by design, and if the court shall report that the maiming or mutilating or injuring was not occasioned by design, the soldier shall not be liable to be called to account in respect thereof; but if the court shall report their opinion that such maiming or mutilating was occasioned by the designed and wilful act of such soldier, or by any other person at the instigation of such soldier, with intent on the part of such soldier to render himself unfit for the service, and not by accident, in that case the soldier shall be forthwith put upon his trial before a *general, district, or garrison* court martial on a charge for *disgraceful* conduct.

contrasted with the amended article, now in force.

Maim or mutilate.

Court of enquiry assembled of necessity.

and trial by court martial, if its opinion is that the maiming was wilful.

233. It may be observed that the addition of the words "with intent" to render himself unfit for the service, has served to bring out more clearly what had always been the spirit and meaning of this article. Its penal provisions never were, and now, still more distinctly, cannot be, taken to apply in any case, — as, for example, of a man intending to desert, and being frostbitten when hiding from the parties sent in pursuit of him, — where although the maiming or mutilation has been occasioned by a designed and wilful (and

What intention is a necessary ingredient of this offence:

cases in which the absence of it may be inferred.

(5) As to the proof of intention, see hereafter, § 881.

Art. 85.

possibly an unlawful) act, it may be made appear that it was not with intent on the part of the prisoner, to render himself unfit for the service.

Maiming
another
soldier,
even at the
instance of
such soldier,
with intent,
&c.

234. The maim or injury of another soldier must be *with intent* to render the other soldier unfit for the service. Maiming or injuring another soldier with any other criminal intention, might, according to the circumstances, be liable to the penalties of disgraceful conduct, under the last clause of the article.

Stealing by
a soldier;

235. Stealing by a soldier, or receiving goods stolen, from a comrade or military officer, is an offence which has constantly been tried before courts martial of every description, as a "crime not capital, to the prejudice of good order and military discipline;" but the legality of such custom had been doubted, before a power to that express effect was introduced into the mutiny act. The section⁶ (omitted on the revision of the mutiny act in 1860) defining the powers of a district or garrison court martial as to forfeiture of service, which had been repeatedly amended after its introduction in 1829, at first declared "stealing from a comrade or from a military officer"

petty
fraudulent
offences
cognisable by
district courts
martial.

within the jurisdiction of such court; in 1830, "stealing any money or goods the property of a comrade, of a military officer, or of any military or regimental mess;" and in the mutiny act of 1833, this provision was further extended to the commission of "any *petty* offence of a felonious or fraudulent nature, to the injury of or with intent to injure any person, civil or military." By the omission of "*petty*" in 1847, and the addition of other words, in order to meet cases arising in practice, and which had not hitherto been provided for, the clause was extended to almost every offence, which, it may be supposed, can be adequately punished by a sentence short of penal servitude. But doubts having arisen as to the proper construction of the twenty-eighth section of the then mutiny act and the *then* eighty-fifth and eighty-sixth articles of war (corresponding to the fifth, sixth, and seventh clauses of the eighty-third article of the present year), "in respect to the legality of trying soldiers by courts martial "for 'disgraceful conduct' in stealing or embezzling money "or goods the property of civilians, or in receiving the same

Offences
committed
against
civilians,

amounting
to felony;

(6) Mut. Act (1829-1846), sec. 9; (1847-1859) sec. 28.

"knowing them to be stolen, or in committing any offence amounting to actual felony, and a case having, by the command in chief's desire, been submitted to the law officers of the crown," it was made known to the army by a circular memorandum⁷ that "the attorney and solicitor general had recorded a distinct opinion, that soldiers may be lawfully tried and punished by courts martial for such offences."

may be lawfully charged as "disgraceful conduct;"

236. The sixth clause "or who shall commit any other offence of a felonious, or fraudulent nature" has been made even more extensive by the omission in the articles of the present year of the words "*to the injury of, or with intent to injure any person, civil or military;*" and although in this and other cases the corresponding clauses in the mutiny act have been omitted, and the inconvenience, arising in the administration of military law from occasional discrepancies between the statute law and the articles of war, has been thus remedied, it is held that the declaration in the first section of the mutiny act of the general power of the Sovereign to make articles of war, "which shall be judicially taken notice of by all judges and in all courts whatsoever," has rendered the insertion of particular statutory provisions to be supererogatory.

and this, although the special provision to that effect has been expunged from the mutiny act.

237. The "other disgraceful conduct" mentioned in the seventh and last clause of this article must be "of a cruel, indecent, or unnatural kind."

Any other disgraceful conduct.

238. The proper use of the term "disgraceful conduct" will be best understood by an attentive consideration of the opinion of His Grace the late Commander in chief as to the effect of its indiscriminate use, which has been already quoted (§ 228), and of the circular letter,⁸ accompanying the supplementary articles issued in November 1829, and written by the late Lord Hardinge, then secretary at war, with reference to the peculiar punishments for offences of a disgraceful character. He observes, that "the penalty of forfeiture of pension for disgraceful conduct was introduced into the mutiny act in consequence of numerous instances having occurred, in which soldiers guilty of *infamous* and *vicious* crimes,

The principle of the practical application of this term laid down by the Duke of Wellington and Lord Hardinge.

Disgraceful conduct.

Penalty of forfeiture of pension why established.

(7) Dated, Horse Guards, 29th November, 1851.

(8) No. 649, dated, War Office, 23rd November, 1829.

Offences specified in articles of war, and not designated as disgraceful, cannot be charged as such.

and disgracefully discharged for such crimes, were pensioned for life." He then continues in the following words: "In order that the practical application of the words disgraceful conduct . . . may be liable to the least possible misconception, and that soldiers guilty of unmilitary conduct, of neglect of duty, and of other offences *distinctly specified* in the articles of war, *may not* be tried under, and be subject to the penalties of, this charge, I have to state that *disgraceful conduct* implies confirmed vice, and all unnatural propensities, indecent assaults, repeated thefts and dishonesty, ferocity in having maimed other soldiers or persons, self-mutilation, tampering with eyes, and all cases of confirmed malingering, where the conduct is proved to be so irreclaimably vicious as to render the offender unworthy to remain in the army."

Ordinary offences against discipline not to be charged as.

239. The only essential difference between the present articles of war, and this circular, as regards this subject, is that the articles render a soldier subject to the penalties of *disgraceful conduct* for thieving on the *first* offence, whereas the latter refers to *repeated* thefts. There can be no doubt but that the first offence incurs the liability to the penalties in question, but this remark of the secretary at war, and the general tendency of his letter, serve to show that the penalties for disgraceful conduct were meant to be applied only to reprobate, irreclaimable characters, from whom an officer, and even the comrades of the soldier, would desire to be freed. It is very certain that no offence, nor the repetition of offences otherwise distinctly specified in the articles of war, as drunkenness or insubordination, nor any offence not declared by the articles of war to be *disgraceful conduct*, can subject the offender to the peculiar penalties attending that crime, unless the same be proved to come within the designation, *cruel, indecent, unnatural, felonious, or fraudulent*.

False confession of desertion

an expedient of discontented soldiers,

240. The special punishment which may be awarded by a district court martial on conviction of a false confession of desertion has been already (§ 158) mentioned. The fiftieth article, by which this offence is declared, is well calculated to frustrate any attempt in this direction on the part of men who might be desirous of being sent home, even as

prisoners, from a bad quarter, or of escaping from any distasteful duty. It provides that if a soldier¹ while serving in any regiment or corps shall confess to his commanding officer — thus guarding against any “idle talk” being unfairly laid hold of (§ 1004) — that he is a deserter from some other regiment or corps, or from the militia, and evidence of the truth or falsehood of such confession cannot then be conveniently obtained, a record of such confession, signed by such commanding officer, shall be entered in the regimental books, and such soldier shall continue¹ to do duty in the regiment or corps in which he shall then be serving, or in any other regiment or corps to which he may be transferred, until he shall be discharged, or until legal proof can be obtained of the truth or falsehood of such confession, of the making of which confession the said record, or a copy thereof purporting to bear the signature of the officer having the custody of the regimental books, shall be sufficient evidence: and in any case where such confession shall then appear to be true, the soldier may be tried² for desertion, “either in the corps in which he is serving, or in that to which he originally belonged”³ and on conviction may be punished accordingly. Where such confession shall appear to be false, such soldier may be arraigned before a district or garrison (§ 261) court martial on a charge for making a false statement to his commanding officer, and punished on conviction, as provided by the article by such forfeitures, in respect of pay, pension, annuities, and medals, as may be “awarded” (§ 158, 180), in the case of a conviction for desertion, in addition to any other punishment such court may award in respect of the charge on which he is arraigned. The fifty-second article of war moreover provides that the commander in chief may order a soldier who, while serving in any regiment or corps, confesses himself to be a deserter

now guarded
against.

Peculiar
proof made
evidence.

Peculiar
punishment.

(1) Persons, not being soldiers, making a fraudulent confession of desertion, on proof of their confession being false, before any two justices, are liable to be punished as “rogues and vagabonds.”—Mut. Act, sec. 37.

(2) This is a necessary exception to the principle recognized in the regulation (Queen’s Reg., p. 122), which

lays down that “The act of placing arms in the hands of a prisoner for the purpose of attending parade, or of performing any duty, absolves him from trial or punishment for the offence which he has committed.”—See § 566.

(3) Circular—Horse Guards, 25th May, 1860.

from another regiment or corps, to continue to serve in the regiment or corps in which he shall be then serving.⁴

Other articles prescribing discretionary punishment of a minor description are not noticed here.

241. The other offences, declared in the articles of war, are specified in the next chapter, with reference to the distinctive jurisdiction of courts martial, and there remains only one which presents any peculiarity in the punishment assigned to it (or rather in its wording), and which, therefore, may be noticed in this place.

Art. 103. An officer, whose character has been publicly impugned, not submitting the case to competent military authority within reasonable time.

Punishment of failure to refer case affecting an officer's honour to competent authority.

242. *Art. 103.*—The article requires an officer to submit the case to his commanding officer or other competent military authority, “on pain of suffering such punishment as a general court martial may award.” This article replaces the seventeenth article of former years, which, because it prescribed no punishment on a failure to accept its suggestion, was, on a recent court martial, held to have failed in its purpose of requiring officers to submit to the commanding officer any difference between them which their friends had failed to adjust.

Determination of the authorities to suppress duelling.

243. This and the other articles relating to duelling were amended in the year 1844 (as explained in the circular transmitting the mutiny act and articles of war of that year), “for the purpose of more effectually discouraging and prohibiting a practice which is a violation of Her Majesty’s orders, and a flagrant breach of the laws of the land.”

Spirit of the articles on this subject,

as explained by the late Lord Hardinge,

244-9. These articles have indeed become obsolete, as regards their actual wording, but, as their spirit survives in the existing articles,⁵ it cannot be out of place to retain the latter portion of Lord Hardinge’s letter, in which he so clearly put forth his own sentiments on this subject: “Personal differences between gentlemen living together as brother officers can seldom fail to be honourably and promptly adjusted, in the first instance, by explanations between their mutual friends; the propriety of an early explanation and acknowledgment of error was so forcibly pointed out by field marshal the Duke of Wellington in confirming the sen-

(4) See Queen’s Reg., p 171, par. 7. 1844. *Signed*, H. Hardinge.

(5) Dated, War Office, 18th April, (6) Art. War, 15, 16, 102, 103.

tence of a general court martial in 1810, that I insert the following extract of his grace's sentiments on this point:—
' The officers of the army should recollect, that it is not only no degradation, but it is meritorious in him who is in the wrong to acknowledge and atone for his error, and that the momentary humiliation which every man may feel upon making such an acknowledgment is more than atoned for by the subsequent satisfaction which it affords him, and by avoiding a trial and conviction of conduct unbecoming an officer.' "

and by the
sentiments of
the Duke of
Wellington.

CHAPTER V.

DISTINCTIVE JURISDICTION OF COURTS MARTIAL.

Designation of
courts martial
now existing.

250. THE various descriptions of courts martial, as specified in the mutiny act and articles of war, are General, Detachment-general, District or garrison, Regimental, and Detachment; to which must be added District for the trial of warrant officers.

Drum-head
courts martial

251. Field or drum-head courts martial, so called from being held in the field or at the drum-head, were formerly frequently held in cases supposed to require an immediate example; but since it has been requisite to administer an oath to the members of, and witnesses before, courts martial, other than general, they have gradually fallen into desuetude, and are now very rarely resorted to. The articles of war authorize a deviation from the prescribed hours, in cases requiring immediate example;¹ it is, therefore, perfectly regular, in such cases, to assemble a court martial on the spot, at any hour, and to inflict the sentence forthwith; but the ordinary rules must be adhered to, both in the convention and composition of the court, in the administration of oaths, and in the reducing the proceedings to writing. In the event of mutiny or gross insubordination on the line of march or on board any ship not in commission, regimental and detachment courts martial are armed with special jurisdiction, extending to the trial of those crimes, but without power to award sentences exceeding those which a regimental court martial is ordinarily competent to award.²

are for the
most part
obsolete.

Distinctive
jurisdiction
of courts
martial;

252. Courts martial, considered with reference to the powers in regard to sentence upon offenders granted by the mutiny act, are of three descriptions: — General and detachment general courts martial: — District and garrison courts martial: — and lastly, Regimental and detachment

(1) Art. 163.

(2) Mut. Act, sec. 11. Art. War, 137.

courts martial. The courts martial included under these two last divisions are also frequently classed together as minor courts martial.

253. The composition and jurisdiction of courts martial in general has been already enlarged upon. It is now necessary to notice the distinctive jurisdiction, as to persons and offences, of the several descriptions of court.

254. Soldiers,³ including non-commissioned officers, are liable to be brought before every description of court martial, according to their offences, subject, however, to a provision in the army service act, which enacts, that when the term of service of any non-commissioned officer or soldier expires *after* any offence committed by him, and *before* he has been tried or punished, he cannot be so tried for the same after the expiration of his service, except by a general or district or garrison court martial.⁴

255. Warrant officers *may* be tried by district court martial, when any offence charged against them is not so serious as to require investigation by a general court martial; whilst commissioned officers cannot under any circumstances be tried by any minor court martial.

256. Except in the case of *soldiers* tried for disgraceful conduct (§ 235-6), general courts martial alone are empowered to try civil offences, and that only under the hundred and thirtieth and the two following articles of war. A further distinction referring to the ordinary jurisdiction of courts martial, as respects offences, independent of the punishments they may entail, is pointed out by the articles of war, which, in declaring offences, direct the description of court by which they shall be tried; some by a general court martial, whether committed at home or abroad, or only if in foreign parts; others by a district or garrison court martial; and the remainder by general, district, garrison, regimental, or other court martial.

(3) "*Soldier*" in the mutiny act and articles of war now comprehends non-commissioned officers, which was not invariably the case in former years. — Mut. Act, sec. 66. Art. War, 107.

(4) 10 & 11 Vict. c. 37, s. 7. This limitation, it will be observed, does not extend to the trial of offences committed during the time which may elapse *between* the expiration of the

time of service on any foreign station and the final discharge of the soldiers in England, and the same act elsewhere (sec. 6) provides that soldiers entitled to their discharge shall, during such time, remain subject to all the provisions of the mutiny act as fully as before the expiration of their term of service.

Cases reserved to the cognizance of general courts martial;

257. A general court martial can alone hear an appeal under the thirteenth article of war; and the following offences are moreover expressly declared cognizable by a general court martial, and cannot be tried by any minor court martial, except by permission of the general or superior officer; excepting also mutiny, gross insubordination, or other offence on the line of march, or on board any ship not in commission.

without specification of place;

- Art. 13. Vexatious and groundless appeal : (§ 342)
- 40. Mutiny ; sedition ; misprision of mutiny : (§ 166)
- 41. Violence to a superior officer in the execution of his office : (§ 167)
- 42. Disobedience to the lawful command of a superior officer : (§ 595)
- 55. Holding correspondence with, or relieving, the enemy : (§ 190)
- 56. Cowardice ; shamefully abandoning post ; compelling, or using means to induce, others to do so : (§ 191)
- 57. Leaving post in search of plunder : (§ 195)
- 58. Treacherously betraying watchword :
- 59. Intentionally occasioning false alarms :^a
- 60. Casting away arms or ammunition in presence of the enemy .
- 61. Quitting, or sleeping on, post.

in foreign parts.

258. To which must be added, if committed in *foreign parts* :

- Art. 62. Violence to bringer of provisions ; forcing a safeguard ; breaking into a house or cellar or store for plunder (§ 197, 198).

Offences reserved to the cognizance of general or district courts martial.

259. The offences which in like manner are limited to the cognizance of a general, or district, or garrison court martial, and subject to the same exceptions, are :—

- Art. 35. Irreverence at divine worship ; violence to chaplain or minister :
- 39. Perjury :
- 43. Traitorous or disrespectful words against the person of the Sovereign or any of the royal family :
- 44. Disobeying orders in case of fray :^a
- 46. Desertion :
- 47. Absence without leave above twenty-one days :
- 48. Persuading to desert ; harbouring deserters :
- 63. Sending unauthorized flag of truce :
- 64. Giving different parole or watchword without good cause :
- 65. Spreading reports in the field, calculated to create unnecessary alarm :
- 66. Using words to create alarm in action :
- 67. Producing injurious effects by improper disclosures :
- 68. Quitting ranks in action without orders :

(5) Giving false alarms *at home*, although *intention* may not be charged, is an offence cognizable by any court martial. — Art. 75.

(6) This article, as worded, would seem applicable to officers rather than soldiers, but the articles of war do not make the distinction.

- Art. 69. Leaving guard, picket, or post ; becoming prisoner by neglect: Offences reserved to the cognizance of general or district courts martial.
70. Seizing supplies proceeding to the army, contrary to orders:
71. Conniving at exaction from sutlers ; or deriving advantage from sale of provisions, &c.:
72. Impeding or refusing to assist provost marshal or other officer in the execution of his duty :
73. Breaking arrest ; escape from confinement or prison :
84. Embezzlement :
85. (I.) Malingering ; wilfully injuring health or delaying cure:
(II.) Self-mutilation: (§ 232)
Maiming another soldier:
(III.) Tampering with eyesight:
(IV.) Stealing, or receiving when stolen, the property of comrade or military officer:
(V.) Purloining, or receiving when stolen, government property:
(VI.) Other offences of a fraudulent or felonious nature against any person, civil or military:
(VII.) Any other disgraceful conduct, being of a cruel, indecent, or unnatural kind :
91. Making, or being privy to, any false entry or erasure in description-book and records ; withholding facts relating thereto:
92. Intentional false return of arms, ammunition, clothing, money, stores, provisions ; being concerned in, or conniving at, embezzlement of stores, or misapplication of public money, by means of false documents :
93. Evading orders of Her Majesty on foregoing points :
95. Demanding extra billets ; quartering families or servants without consent ; freeing from billets for money :
99. Offences on recruiting service :
100. Refusing assistance to civil magistrate :
101. Protecting from creditors on false pretences :
102. Not doing best to prevent a duel.

260. The army service act (10 & 11 Vict. c. 37, s. 7) provides that no non-commissioned officer or soldier shall be tried after the expiration of his service (§ 254), except by a general, district, or garrison court martial.

261. The trial by court martial of two offences is, by the terms of the mutiny act and articles of war respectively, restricted to a district or garrison court martial *only*:

Offences cognisable by district or garrison court martial only.

Mut. Act, 48. Wilful false answer at attestation :

Art. 50. False confession of desertion (§ 240).

262. The offences, which are cognizable by a general, district, garrison, regimental, or other court martial, are:—

Offences cognisable by any court martial.

Mut. Act, 38. False representation in respect to extension of furlough:

Art. 36. Disobedience of orders to attend school:

45. Disrespect to commander in chief:

54. Absence without leave (under twenty-one days):

(7) To be within this article the offender must be in command of a garrison, fort, or barrack.

Offences cognizable by any court martial.

- Art. 74. Absence from parade, or quitting ranks:
 75. Giving false alarms, *at home* :¹
 76. Not reporting prisoner :
 77. Releasing without authority, or suffering the escape of, a prisoner :
 78. Unnecessary detention of a prisoner, without trial :
 79. Neglecting garrison or other orders :
 80. Drunk on duty under arms :
 81. Drunk on or for duty not under arms, or on parade, or on the line of march :
 82. Habitual drunkenness :²
 96. Ill-treatment of landlords :
 98. Overloading pressed carriages ; ill-treating the waggoners ; refusing certificates of the sums due :
 104. Striking or ill-treating a soldier :
 105. Hiring for duty or conniving thereat :
 106. Pawning, making away with, selling, spoiling arms, accoutrements, necessaries, or medal ; selling, losing, ill-treating horse :
 107. Malicious destruction of property :
 108. All crimes not capital, and all acts, conduct, disorders, and neglects, to the prejudice of good order and military discipline, not otherwise specified :
 164. Disturbing proceedings of court martial.

Distinctive jurisdiction of inferior courts may be extended, except as to desertion, by the superior officer,

263. Notwithstanding this classification, a general or superior officer is empowered to extend the jurisdiction of inferior court martial (its powers in regard to sentence on offenders being limited as at other times) over any offence cognizable by any court martial, which he is himself authorized to assemble ;³ except that desertion cannot, under any circumstances, be tried by a regimental court martial.

who has authority to confirm the sentence of the prescribed court.

264. No officer can exercise his discretion in permitting the trial of a grave offence by an inferior court, unless he has the power of confirming the proceedings of that description of court by which it is cognizable under the provisions of the articles of war : or, at home, where the proceedings of all general courts martial are submitted to the Queen, unless he has a warrant to convene such courts, and in this case, may dispense with its assembly ; but abroad, an officer, authorized merely to assemble general courts martial, or at home or abroad, an officer authorized to assemble a district court martial cannot dispose of any case which is not clearly within the cognizance of that description of court,

(1) The offence of "*intentionally*" occasioning false alarms is directed (*Art. 59*) to be tried by a general court martial, without reference to the place where committed.

(2) The first clause of this article provides punishments for a first con-

viction by a regimental or detachment court martial, or by a *general* district or garrison court martial ; the third clause does *not* provide for the punishment of a subsequent conviction by a general court martial.

(3) *Art. War*, 138, 142.

without the permission of the competent authority, that is, of the officer invested with the power of confirming the proceedings of the higher tribunal.

265. It had always been considered in the army, that an offence made by a special article cognizable by a general court martial, could not, charged in the express terms of that article, be tried by an inferior court. Mr. M^cArthur observed, "should a non-commissioned officer or soldier be brought before a regimental court martial for mutiny, desertion, or any of the higher crimes cognizable by a general court martial, he might not only plead the incompetency of the regimental court martial to try him; but should this regimental court, even without a soldier's availing himself of such a plea, proceed in the trial, and adjudge a punishment for a crime not within the jurisdiction of the court, the members would, collectively or individually, be liable to prosecution in a court of justice, for the illegality of their proceedings."⁴ This reasoning, or rather exposition of the law, still holds good, and is especially applicable, as commanding officers are expressly forbidden to give in against a prisoner "vague and indefinite charges,"⁵ and thus try before a regimental court martial, offences which are directed to be tried by general, or district, or garrison courts martial. In cases where these grave offences may admit of less serious notice, and when commanding officers shall deem it advisable to proceed to trial by a district, garrison, or regimental court martial, they are enjoined to lay a statement of the case, together with the charge they intend to bring, before the general or other officer commanding the brigade, district, or garrison, with an application so to proceed; who is to exercise his discretion in directing the description of court by which the offender shall be tried. Should he accede to the application, his permission is to be

Grave offences may not be charged indefinitely, and thereby tried by an inferior court.

How a commanding officer shall proceed to extend the jurisdiction of minor courts martial.

(4) M^cArthur (4th edition), vol. i. p. 158.

(5) Art. War, 142. Previous to the direct injunction to the contrary in this article, it was customary to modify the charge, so as to avoid the express offence declared cognizable by a superior court, and, by these means, to bring it within the jurisdiction of

an inferior court martial. Thus facts which might amount to mutiny have been charged as disorderly conduct, to the prejudice of good order and military discipline; desertion has in like manner been charged as absence without leave: but any such practice is now absolutely prohibited.

noticed in the monthly return of courts martial sent to the adjutant general.⁶

Authority for extending the jurisdiction of an inferior court martial to be laid before it;

266. Though it is not rendered necessary by the articles of war, it may be inferred, that the permission of the superior officer to try a soldier, by a court martial of inferior jurisdiction, for a crime expressly declared to be cognizable by a superior court, should be laid before it, as the members of a court martial are not only responsible to military authorities, but are amenable to courts of civil judicature, for any undue exercise of jurisdiction or illegal assumption of power.

and referred to in the heading of the proceedings.

267. It has become the prevailing practice in the army, enforced in many commands by the local standing orders, to head the proceedings (§ 475) of all courts martial, where this permission is requisite, "assembled by order of" *the convening authority* "and under authority of" the superior officer, with a specification of the date of the order and of the permission.

Trials on the line of march for insubordination, and

268-9. Offences on the line of march had been previously expressly excepted from those, for the trial of which recourse must be had to the discretionary power vested in the general officer; and it has now for many years been most advantageously provided that not only on the *line of march*, (and that, whether halting, or on the move, and whether by railway, canal, dāk, or other mode of conveyance,) but also on board of any ship, not in commission, the jurisdiction of a *regimental or detachment court martial* may be extended to mutiny, gross insubordination, or other offences, in the discretion of the officer in immediate command of the troops, by whom the sentence, not exceeding that which a regimental court martial may ordinarily award, may be confirmed and carried into execution on the spot; every sentence so confirmed being noticed in the monthly return of courts martial, and, if on the line of march, reported to the general commanding.⁷

on board ship.

(6) Art. War, 142. Queen's Reg., p. 224 (21). (7) Art. War, 187. Mut. Act, sec. 11.

CHAPTER VI.

GENERAL AND DETACHMENT GENERAL COURTS MARTIAL.

General Courts Martial.

270. GENERAL courts martial, except when held by special warrant or commission under the sign manual, can only be convened by officers duly authorized by warrants in that behalf.¹ Constitution.

271. They must consist of not less than thirteen officers in the Ionian Islands, and in any part of the Queen's dominions, except Jamaica, the Windward and Leeward Islands, British Guiana, Newfoundland, Bermuda, the Bahamas, the Cape of Good Hope or other settlements in Southern Africa, or in any place out of the Queen's dominions, excepting the Ionian Islands, where it may consist of not less than seven, and except in British Columbia, Vancouver's Island, Saint Helena, the settlements on the western coast of Africa, Honduras, New Zealand, the Australian colonies, Hong-Kong, the settlements on the coast of China, the Prince of Wales Island, Singapore, or Malacca, where the minimum is reduced to five commissioned officers.² Composition.

All general courts martial are moreover necessarily attended by a judge advocate or person officiating as such.³

272. The composition of a general court martial, as regards its legal competence, is not in any case affected by the rank of the prisoner, except that no field officer can "be tried by any person under the degree of captain." This provision in the articles of war dates back from the very first, and is absolute under all circumstances. It was only in 1837 that the additional rules, already quoted, (§ 18, 19, 20,) were prescribed in the general regulations; when legally sufficient, for trial of field officers, and other classes of officers.

(1) See before, § 6-11; Appendix, I. II. III. & V. Act (sec. 8) provides only for the British Isles.

(2) Art. War, 109. The Mutiny (3) Mut. Act, sec. 13. Art. War, 154.

and which are necessary to be observed, if possible, in forming the detail of these courts, when ordered for the trial of officers.

Appointment
of president,

273. The president is appointed, under the restrictions already specified, (§ 16, 17,) by warrant, which may be, either for the trial of a prisoner specially named, or generally 'for the trial of such prisoners as may be brought before the court;' or else it may be, 'for hearing and examining into such matters as may be brought before the court,' which last form is now generally used, and appears that which may be preferably adopted; it is applicable on appeals from regimental courts of enquiry, and on all other occasions.⁴

and other
members.

274. The other officers to form the court are appointed in order (§ 21), except in the uncommon case of their being named in the warrant.

Convention by
warrant.

275. Warrants for holding general courts martial have been issued under the sign manual, directed to the judge advocate general, appointing the president, and embodying the charge, and have in several instances specified the names of all the officers appointed to form the court.⁵

Distinctive
jurisdiction,

276. General courts martial *only* are competent to *every* description of person subject to the mutiny act, and *every* offence declared under it;⁶ they can receive appeals from regimental courts of enquiry, under the thirteenth article of war; and can alone supply the place of courts of civil judicature for the trial of civil offences.⁷

and powers,

277. The peremptory and discretionary punishments which general courts martial are called upon to award, in the case of commissioned officers, warrant officers, non-commissioned officers and soldiers, have been already detailed (Chap. IV.), and the proceedings at trials by these courts will be considered in detail in subsequent chapters.

procedure.

Detachment General Court Martial.

Detachment
general courts
martial,

278. This description of court martial was first established, by the act 53 Geo. 3. c. 99, for amending the mutiny act of

(4) See form, Appendix VI.

(5) This precedent was followed in the case of the Canadian rebels, tried at Montreal in 1838 and 1839.

(6) Mut. Act, sec. 8. See § 256.

(7) Art. War, 145, 146, 147. This contingency is not enlarged upon in this place, as criminal offences will be referred to in the last chapter of this work.

that year (1813) with a view to repress the spirit of plunder and outrage which had broken out in the army after the battle of Vittoria, and which the Duke of Wellington had very strongly represented to the authorities at home.¹ Until the year 1860 they could be assembled only "out of Her Majesty's dominions," but the mutiny act of that and subsequent years has declared it lawful to convene in any place "beyond seas" where it may be found impracticable to assemble a general court martial.²

were lawful only out of the Queen's dominions, but are now extended to any foreign station.

279. Under these circumstances a detachment general court martial consisting of *not less than three* officers, (who may be convened, *without*³ a warrant from Her Majesty, by any officer commanding any detachment or portion of troops, upon complaint made to him of any crime or offence committed against the property or persons of any *inhabitant* or *resident* in the country, by any person serving with or belonging to, Her Majesty's armies, being under the immediate command of such officer.

Minimum number of members.

Held on complaint of inhabitant,

280. These courts martial "have the same powers, in regard to sentence upon offenders, as are granted by the mutiny act to general courts martial.⁴ The hundred and nineteenth article also expressly recognizes their "power to pass sentences of death or penal servitude."

have powers of general courts martial,

to sentence death.

281. The terms of the mutiny acts have for many years prevented a doubt,⁵ which had previously existed, as to the competency of this court martial to entertain a charge against an officer, as it declares it may be convened by "any officer commanding, . . . upon complaint made to him of any offence committed against the property or person of any inhabitant, . . . by *any person* serving with or belonging to Her Majesty's armies, being *under* the immediate command

Distinctive jurisdiction;

over persons.

(1) See the letters from Lord Bathurst and the Duke of York accompanying the act. — Supplementary Despatches of the Duke of Wellington, vol. viii. pp. 104-107.

(2) Mut. Act, sec. 12. Art. War, 110.

(3) Art. War, 110. See before, § 4.

(4) Mut. Act, sec. 12. Art. War, 126.

(5) Former acts specified the persons amenable to this court martial, as "any non-commissioned officer, soldier, or other person;" in other parts

of the same statute, officers, when intended to be comprehended, were invariably named first. It was thus by no means clear that officers could be understood, or were intended to be included, in this case — particularly when the general rule for the construction of statutes was considered, "that where things or persons of an inferior degree are first mentioned, those of a higher dignity shall not be included under general subsequent words."

Distinctive
jurisdiction

of any such officer." The words *any person*, must clearly comprehend *officers* under the immediate command of the officer, who may be authorized to convene the court.

over offences.

282. It is particularly to be remarked, that this court martial can only be held upon *complaint* of an offence against an *inhabitant* or *resident*. In ordinary cases, as for any breach of discipline, the detachment general court martial has no jurisdiction.

Composition.

283. The court, as before noticed, may consist of three officers, and it is expressly provided by the hundred and seventeenth article of war, that the president may be under the rank of captain; nor is the officer commanding the detachment debarred from appointing himself president, as the same article also provides that, "In the case of a detachment general court martial, the officer convening such court may be the president thereof."

Rank and
appointment
of president.

Peculiarity
of constitution
of the court

284. An officer of whatever rank may therefore, in the special cases particularized, convene this peculiar court martial, provided only there are two commissioned officers under his command who are available as members. The abuse of such extraordinary power is guarded against by the provision that no sentence "shall be executed until the general commanding the army of which the division, brigade, detachment, or party, forms part, and to which any person so tried, convicted, and adjudged, shall belong, shall have approved and confirmed the same."⁶

does not open
the door to
abuse of its
power, by a
subaltern
detached,
as the sentence
must in all
cases be
referred to a
general officer.

Advantages of
these courts
martial in
special cases.

285-9. It may be observed, that the detachment general court martial is designed, and well calculated to affect a very important object—the investigation of an alleged offence on the spot where it may have been committed. The evidence of the aggrieved inhabitant may, by its intervention, without inconvenience be received, though the detachment to which the offender belong be on the line of march, or on detached duty at a considerable distance from the head-quarters of the army. This court is calculated to be eminently useful on the march of detachment from depôts or hospitals on the lines of communication of armies. Such detachments are rarely attended by a provost marshal; great excesses,

(6) Mut. Act, sec. 12. Art. War, 126.

therefore, might be committed on the people of the country with impunity, if a court could not readily be convened to receive their evidence, for in many cases it would be impracticable to convey to head-quarters inhabitants whose testimony may be essential to the ends of justice and discipline.

CHAPTER VII.

DISTRICT OR GARRISON COURTS MARTIAL.

District or
garrison courts
martial;

290. THE district or garrison court martial is of comparatively recent origin, having been first established by the mutiny act and articles of war for the year 1829, in the place of general regimental courts martial.¹

constitution.

291. It is convened either by the officer under whose command the corps is placed, being thereto authorized by warrant under the sign manual, or by his delegated authority. Officers in command abroad, and officers commanding districts and divisions at home, each year receiving warrants empowering them to convene district or garrison courts² martial, and also to direct their warrant, to any officer, under their command, who has the command of a body of forces, which at home must not be less than four troops or companies, authorizing such officer, not being however below the degree of a field officer, except in detached situations beyond the seas where a field officer is not in command, in which case a captain may be authorized to convene district or garrison courts martial.³

Composition,
and numbers,
at home

292. The mutiny act prescribes that every district or garrison court martial convened within the United Kingdom or British Isles shall consist of not less than seven commis-

(1) General regimental courts martial were held by regimental commanding officers duly empowered by warrant under the sign manual, consisted exclusively of officers of the same regiment, and were attended by a judge advocate; as was also the district court martial for the first year of its introduction into the service. Their jurisdiction extended over the soldiers of the particular regiment for which the warrant was granted, the commanding officer was authorized to appoint himself president, and they

were, in certain cases, empowered to award transportation.

(2) These courts are not unfrequently convened under circumstances when both of the alternative names were equally unsuitable; whereas the name "*Brigade*" courts martial, which some years ago it was intended to have given them, but which appears to have been lost sight of, would be as applicable in garrisons as in the field or in cantonments.

(3) See Warrants, Appendix IV. & VI. Mut. Act, sec. 6. Art. War, 113.

sioned officers, and the articles of war further direct that it shall not consist of less than seven, except in Bermuda, the Bahamas, the Cape of Good Hope or other settlements in Southern Africa, Saint Helena, Helena, Jamaica, Honduras, Newfoundland, New Zealand, the Australian colonies, the Windward and Leeward Islands, British Guiana, Hong-Kong, and the settlements on the coast of China, where it may consist of five commissioned officers, and in the Prince of Wales Island, Singapore, Malacca, British Columbia, Vancouver's Island, and the settlements on the western coast of Africa, where it may consist of not less than three.⁴

293. The hundred and twelfth article further explains that it may be composed of any officers of different corps, of officers of the artillery, engineers, marines, and general staff, or that it may be entirely composed of officers of the same corps.⁵

294. The president is appointed by or under the authority of the officer convening the court, under the limitations which have been already (§ 15-17) noticed. The president, as at other minor courts martial, stands in the place of a judge advocate.⁶ He summons witnesses when so required by the prosecutor or prisoner,⁷ and transmits the original proceedings to the judge advocate general in London.⁸

295. The jurisdiction of a district or garrison court martial as to the cognizance of crime, has been noticed (§ 259-262)

and abroad;

consisting of officers of different or the same corps.

President: appointment and .

duties of.

Jurisdiction of garrison court martial.

(4) Mut. Act, sec. 9. Art. War, 111.

(5) In the corresponding article of 1844, an exception was first inserted—the article from that time providing that the district or garrison court martial, “except for the trial of warrant officers, may be entirely composed of officers of the same regiment.” This exception is not further noticed at this place, as “district” courts martial for the trial of warrant officers, as constituted under the 114th article, and the points of difference between them and district or garrison courts martial are subsequently adverted to.—See hereafter, § 304-6.

(6) As to the duties of the president, see § 430. In the year 1830, the mutiny act dispensed with the presence of a judge advocate; and the secretary at war pointed out that it

would be the duty of the president “to take care, before the court is sworn, that the prisoner has had notice of the intention to bring forward previous convictions in evidence against him on his trial.” It is now the custom, enforced by the regulations, that the court on the trial of a soldier invariably reopens after a finding of guilt, to enquire into the prisoner's general character and previous convictions; and it is now also well understood that the duty of giving notice to the prisoner attaches to a staff officer, or, in ordinary cases, to the adjutant of the regiment to which the prisoner belongs or is attached, or to the officer who is to give evidence as to character, &c., and to produce the evidence of previous convictions.

(7) Mut. Act, sec. 13.

(8) Art. War, 160.

Jurisdiction of
garrison court
martial.

extended to
the trial of
warrant
officers.

Powers.

Wherein dif-
ferent from a
general court
martial.

District court
martial may
recommend
discharge with
ignominy,
for desertion
and disgraceful
conduct only;

and limited
to six months'
imprisonment.

when referring to the distinctive jurisdiction of courts martial over offences. It differs from a general court martial as not being competent to entertain a charge against a commissioned officer, or, except by permission (§ 263), to try offences reserved to the cognizance of general court martial. An alteration introduced in the articles of the present year provides that warrant officers may be tried by "district or garrison" courts martial. As will have been observed in the specification of the punishments applicable to warrant officers (§ 162), it is not authorized in their case to award imprisonment. The peculiarly constituted district court martial for the trial of warrant officers still however remains in the articles of war.

296. A district or garrison court martial has the same power as a general court martial to sentence any soldier to such punishments as accord with the provisions of the mutiny act, except that death and penal servitude cannot, in any case, be adjudged by it,⁹ and that, as above referred to, the article provides a special restriction in the case of warrant officers.

297. These punishments need not be here recapitulated, as the powers of general courts martial have been already detailed (§ 153-163); nor will it be necessary again to specify the forfeitures which this description of court may award for desertion (§ 185); for false confession of desertion (§ 240); and on conviction of a charge for disgraceful conduct as specified in the eighty-third, eighty-fifth, and ninety-first to the ninety-third articles (§ 231).

298. A district or garrison court martial is authorized by the articles of war to *recommend* any soldier convicted of desertion or *disgraceful conduct* to be discharged with ignominy, provided the court has in respect thereof made the forfeiture of all claim to pension on discharge a part of the sentence passed on such offender,¹ and the court may also recommend that he may be marked with the letters, B.C., as provided by the mutiny act.²

299. There is still another distinction between district or garrison courts martial, and general courts martial, which it may be well to notice in this place. The mutiny act gives the same powers of unlimited imprisonment to both kinds of courts martial, but the regulations require that the duration

(9) Mut. Act, sec. 9.
(1) Art. War, 52, 85.

(2) Mut. Act, sec. 26.

of imprisonment for all ordinary offences, is to be limited to six months, and for the minor offences, such as "Absence without leave," unaccompanied by aggravating circumstances, or "Drunkenness," not occurring on duty, the imprisonment awarded by a district court martial is not to exceed two or three months' duration."³

300. It is not necessary to dwell upon the matter of proceedings at trials by district or garrison courts martial, as the proceedings of general courts martial will be considered in detail hereafter. Form
of trial.

301. The proceedings (§ 475) are forwarded to the general or other confirming officer by the president — *direct*, except in England, when, in those counties where the troops report direct to the Horse Guards, the president forwards them, sealed, through the senior officer. Proceedings,
how forwarded.

302. The officer empowered by warrant, under the *sign manual*, or under Her Majesty's delegated authority, to convene these courts, or, in his absence, the officer on whom the command may devolve, is authorized to receive the proceedings and sentences; to cause the same to be put into execution; or to suspend, mitigate or remit the same, as may be best for the good of the service. General officers or officers in command abroad are further authorized, in their discretion, to delegate their authority for confirming, suspending, mitigating or remitting the sentence of courts martial, to officers under their command, but at those stations only at which inconvenience to Her Majesty's service might arise, if the execution of the sentence were delayed until reference could be had to them, and only to officers not under the rank of field officer, except that at those stations where inconvenience to the service might arise, if the sentence were delayed, when a captain may be so authorized.⁴ Confirmation.

303. The original proceedings of district or garrison courts martial, after they have been duly confirmed and promulgated, are required to be transmitted without delay to the judge advocate general in London, in whose office the article directs they shall be carefully preserved, but, as Proceedings,
when dis-
posed of.

(3) Queen's Reg. p. 225.

(4) See Appendix, III.

provided in 1859, not necessarily for more than twelve years.⁵

Court for the Trial of Warrant Officers.

District courts
martial for the
trial of warrant
officers;

constitution;

composition;

president;

limitation of
sentence;

304. The articles of war point out the composition and peculiarities attaching to the court martial, now termed *District*, but formerly *Detachment*,⁶ for the trial of warrant officers. These courts martial are appointed by order of the general commanding the district, if convened at home; or, if elsewhere, by the general commanding in chief on the station. They are in no case, to consist of less than *seven* commissioned officers, except in Bermuda, the Bahamas, the Cape of Good Hope, the settlements in southern or the western coast of Africa, Saint Helena, British Columbia, Vancouver's Island, Jamaica, Honduras, Newfoundland, New Zealand, the Australian colonies, the Windward and Leeward Islands, British Guiana, Hong Kong, the Prince of Wales Island, Singapore, Malacca, and the settlements on the coast of China, where they may consist of *five*,⁷ of whom, in either case, not more than two are to be taken from the regiment in which the warrant officer to be tried may be serving, nor more than two under the rank of captain.⁸ The president cannot be under the degree of a field officer, unless a field officer cannot be had, and in no case under the degree of captain.⁹ No court martial can sentence a warrant officer to corporal punishment.¹⁰

(5) Art. War, 160. Queen's Reg. p. 224.

(6) See article of war of 1828 and previous years: "Whereas the situation of officers not commissioned by us, or by any of our general officers having authority from us to grant commissions, but appointed by warrant under the signature of the colonels or commandants of the corps to which they belong, has not been hitherto defined, in regard to their being liable to be tried, otherwise than by a general court martial; and it appearing to be highly necessary that our royal pleasure should be declared and made known touching the mode of trial for such officers; We do accordingly direct, that in all cases, where the offence charged against any warrant officer may not be of so heinous a nature as to require investigation by a general

court martial, such officer may and shall be tried by a *detachment* court martial, to be appointed, . . . which detachment courts martial are to be held and proceed in the nature of regimental courts martial."—Arts. War, 1828, sec. 16, art. 17.

(7) The district or *garrison* court martial in the Prince of Wales Island, Singapore, Malacca, British Columbia, Vancouver's Island, and in the settlements on the western coast of Africa, may consist of not less than *three* officers.—See before, § 292.

(8) Art. War, 114.

(9) Art. War, 115.

(10) Art. War, 130. See the discriminative punishments applicable under this article by general and district or *garrison* courts martial respectively, § 162.

305-9. The most important distinction between this and other minor courts martial was done away with in the year 1857, by omitting the clause in the article of war, which provided that the sentence of a district court martial upon a warrant officer, should not be put in execution till confirmed by Her Majesty, if the court were held at home. This obsolete provision involved the necessity of transmitting the proceedings to the judge advocate general for decision, as in the case of all general courts martial held at home: But the proceedings of district courts martial for the trial of warrant officers are now, in all cases, dealt with as those of ordinary district or garrison courts martial.

confirmation.

Proceedings.

CHAPTER VIII.

REGIMENTAL AND DETACHMENT COURTS MARTIAL.

Regimental Court Martial.

Constitution;	310. THE commissioned officers of every regiment, battalion or regimental depôt, or of a detachment of ordnance corps, commanded by an officer not under the rank of captain, may, by the appointment of their colonel or commanding officer, without other authority than the rules and articles of war, hold <i>regimental</i> ¹ courts martial, consisting of not less than <i>five</i> officers, unless it be found impracticable to assemble that number, when <i>three</i> may be sufficient. ² They are empowered to <i>enquire</i> into <i>disputes</i> and criminal matters, and for the punishment of such offenders as, being within their jurisdiction, may be brought before them.
composition ;	
for what purpose held.	
President.	311. The president cannot be under the rank of captain, except on the line of march or on board a ship not in commission or at any place, where a captain cannot be had, and is appointed by or under the authority of the officer convening the court, ³ according to a roster kept for that duty. ⁴
Proceedings.	The swearing of the court and other proceedings are the same as at district courts martial: the latter part of the oath, which refers to the non-disclosure of the vote or opinion of any particular member, was not directed to be taken by members of regimental courts martial, before the year 1829; nor was any oath required to be taken by the members of regimental courts martial, or by witnesses examined before them, until 1805.
Oaths how administered.	

(1) Courts martial, similar to regimental courts martial, are held for the trial of marines, and are termed divisional courts martial.

(2) Art. War, 115. Mut. Act, sec. 10. There was not a corresponding

clause in any mutiny act previous to 1846.

(3) Art. War, 117.

(4) Queen's Reg. p. 1. See remarks, § 21.

312. The jurisdiction of a regimental court martial extends to the trial of all non-commissioned officers belonging to the corps in which it is held, subject to a special limitation created by the army service act, which has been already (§ 254) quoted. Its ordinary jurisdiction over offences has been noticed (§ 262), when referring to the distinctive jurisdiction of courts martial; and also the extension of it by the previously obtained authority of a general or superior officer (§ 263); and also its special enlargement on the line of march, or on board ship (§ 268). The sentences of courts martial held under these circumstances are brought under especial notice. The sentence of any court martial confirmed by the officer in command of the troops on the spot must, as required by the article of war, be reported to the general officer; and a report of the number of courts martial during the voyage is inserted in every disembarkation return, in a column for that purpose, and if no courts martial have taken place it is so stated; and the general or other officer commanding, whose duty it is to inspect the troops after disembarkation, is required to transmit to the adjutant general a return of the courts martial which may have been held during the voyage.⁵

Jurisdiction

extended by superior officer, or on line of march, or on board ship.

313. This court cannot try a soldier for absence without leave exceeding twenty-one days, which must be tried as desertion, a crime not within its competence, nor in any instance to be included amongst those offences which may admit of less serious notice, and which it may be advisable to try by regimental courts martial.⁶

Absence without leave.

314. Besides the forfeitures for drunkenness on or for duty or on parade or on the line of march (§ 206), stoppages under the provisions of the hundred and thirty-second article of war (§ 689); and punishments applicable to non-commissioned officers, (§ 160);—all of which may be awarded by any court martial, and which it is not necessary to recapitulate in this place;—the punishments which a regimental court martial is empowered to award, and which cannot be exceeded in cases of the extension of its jurisdiction over offences, are the following: *corporal* punishment as restricted by the Queen's regulations as respects soldiers

Powers

as to awarding punishment.

(5) Art. War, 137. Queen's Reg. pp. 332, 333. (6) Art. War, 138, 47.

of the first and second classes (§ 675-9), and to the extent of, but not exceeding, *fifty lashes*; ⁷ *imprisonment*, not in any case in addition to a sentence of corporal punishment,⁸ but with or without hard labour, for any period not exceeding *forty-two days*; ⁹ *solitary confinement*, by itself, not exceeding *fourteen days*; ¹ and imprisonment, part solitary and part otherwise, not exceeding together *forty-two days*, the portions of solitary confinement not exceeding fourteen days at a time, and with an interval between them of not less duration than the periods of solitary confinement; ² and,—on conviction of habitual drunkenness,—a forfeiture of *one penny* a day for any period *not exceeding six months*.³

Sentence confirmed by commanding officer, and, when corporal punishment, submitted to senior officer.

315. The sentence of a regimental court martial cannot be executed until confirmed by the commanding officer,⁴ who is, in no case, to be a member of the court.⁵ The mutiny act and articles of war have also, from the year 1860, both added a provision that no sentence of corporal punishment awarded by a regimental court-martial should, except in the case of mutiny or gross insubordination, on the line of march and on board ships not in commission (§ 268) be put in execution in time of peace without the leave in writing of the general or other officer commanding the district or station in which the court may be held.⁶

Proceedings preserved in court martial book.

316. The proceedings of every regimental court martial are to be correctly entered in the court martial book, signed by the president, and countersigned as approved by the commanding officer.⁷ This regulation is held to be complied with by screwing the original proceedings into the court martial book.

Regimental courts martial of enquiry;

317. Regimental courts martial are sometimes convened for the purpose of enquiry, and it would seem that the pre-

(7) Mut. Act, sec. 22. Art. War, 120.

(8) Mut. Act, sec. 23. Art. War, 121.

(9) Mut. Act, sec. 27. Art. War, 131.

(1) Art. War, 123.

(2) Art. War, 131.

(3) Art. War, 82, § 210.

(4) Art. War, 131. A provision, which contemplated the approval of regimental courts martial by governors of garrisons, and had existed in the articles of war for a series of years,

was expunged in 1846. The occasions, where it was desirable to act upon it, were indeed seldom, but it enabled the commanding officer of a regiment, when anything of a personal nature rendered the duty of confirmation by him a delicate or unpleasant task, to refer the proceedings to the governor for approval.

(5) Art. War, 115.

(6) Mut. Act, 22, 11. Art. War, 120, 137.

(7) Queen's Reg. p. 366.

valence of such custom, to the frequent exclusion of courts of enquiry, would accord more with the intention of the articles of war; as it is expressly stated, that they may be held to enquire into such disputes as may come before them.⁸ In such cases, a report or opinion on the dispute, or criminal matter, brought before the court, is required; but the practice of the service has set in the other direction, and by an alteration in the articles of war of 1860 a regimental court of enquiry (§ 340) has replaced the regimental court martial, which for more than a century and a half had been the established tribunal—in the words now expunged from the thirteenth article;—"for the doing justice to the soldier complaining."

are no longer summoned for doing justice on the complaint of soldier.

Detachment Courts Martial.

318. The court now denominated a detachment court martial, (from the temporary suspension of which¹ the inconvenience to be apprehended from its permanent abrogation may be judged,) had formerly been termed garrison, district, line, brigade, detachment, or camp court martial; its appellation varying according to the nature of the command of the officer convening the court.

Detachment courts martial were temporarily discontinued.

319. The composition of these courts is now prescribed by the mutiny act;² but they are held without other authority than the articles of war, by order of the senior officer in command of the detachment, district, station, garrison, barrack, island or colony, *provided* he be not under the rank of *captain*; or, in case of embarkation on board any transport ship, convict ship or merchant vessel, or troop ship not in commission by the appointment of the senior on board, whatever be his rank.³

Convention of,

limited to captain, except on board ship.

320. They are not to consist of less than *five* officers, who

Composition.

(8) Art. War, 116. The author was a member of a garrison court martial, held at Loughrea, in 1807, by order of the commander of the forces in Ireland, for the purpose of investigating the circumstance connected with an affray which had occurred between the main guard and some of the inhabitants. No person was charged before the court, but the evidence received was entirely on oath, and an

opinion as to the cause, origin, and circumstances connected with the affray was required.

(1) The articles of war bearing date 24th March, 1829, contained no provision for the constitution of a court martial of this description; the omission was supplied by a supplementary article in the November following.

(2) Mut. Act, sec. 10.

may belong to one or several corps, unless it be found impracticable to assemble that number, when *three* are sufficient.³

President.

321. The president cannot be the officer ordering the court to assemble, nor under the rank of captain, except on the line of march or on board ship, or in any place where a captain cannot be had.⁴

Jurisdiction.

322. They enquire into such disputes, and criminal matters, as may come before them, according to the rules and limitations observed by regimental courts martial.⁵ The superior officer on the spot, not being a member of the court, has authority to confirm the sentence in all cases.⁶

Confirmation.

Jurisdiction and procedure identical with regimental courts martial

323. Except that a detachment court martial may entertain charges against a soldier of any corps, and a regimental court martial only against soldiers of the particular regiment in which the court is formed, the jurisdiction and powers of a detachment court martial are precisely identical with those of the regimental court martial which has been treated of in the former part of this chapter.

and minutes of proceedings preserved in the same manner.

324-29. The Queen's regulations require that the proceedings of detachment courts martial should be entered in the court martial book in the same manner as regimental courts martial.⁷

(3) Art. War, 116.

(4) Art. War, 117.

(5) Art. War, 116.

(6) Art. War, 131. And see § 315. The limitation as to the infliction of corporal punishment does not extend

to detachment courts martial by the *express* terms of the mutiny act and articles of war, but is manifestly within the intention of the 116th article.

(7) Queen's Reg. p. 391.

CHAPTER IX.

COURTS OF ENQUIRY.

330. COURTS of enquiry are, either, such as are sanctioned by the recognized custom of the service; — or those of a more definite character, and which have been established, for the most part very recently, by the express provision of the articles of war, or the Queen's regulations.

Recent legislation has created courts of enquiry other than those dependent on custom.

331. Courts of enquiry,—other than those last mentioned, which will be separately noticed hereafter, (§ 340)—are appointed by warrant directed to the judge advocate general, under the sign manual, naming the officers to compose the court, and authorizing the judge advocate to summon such officers as the court may deem expedient for the investigation committed to it;¹ or, simply by order from the sovereign; the commander in chief; a general, or other officer in command of a body of troops, of a regiment, or even of a detachment. Courts of enquiry depend on, or are an emanation from, the prerogative of the crown, as “the sole supreme *government* and command of all forces, both by sea and land, ever was and is the undoubted right of His Majesty and his royal predecessors, kings and queens of England.”² The power of the crown, or of a commander of the forces, to appoint courts of enquiry, and the right to withhold the proceedings, as being privileged communications, when required to be produced as evidence in a supreme court of law, has been ascertained by a decision³ of the chief justice of the king's bench, which was confirmed on appeal to the exchequer chamber.

Courts of enquiry, constituted by warrant, or

by order of the sovereign, or of a superior, or commanding officer,

are recognized by the civil courts,

and their report held to be privileged

(1) See the warrant issued by George II., for enquiring into the causes of the failure of the Rochfort expedition, 1757.—Tytler, Appendix, No. III.

(2) 13 Car. 2, c. 6.

(3) In 1819. *Home v. Lord F. C. Bentinck*. 2 Broderip & Bingham, 130.

When a commission is appointed, the judge advocate general, in certain cases, may administer oaths to witnesses.

332. The letters patent of the judge advocate general empower him "at such times as martial law shall be allowed to be exercised," and also his "sufficient deputy or deputies" (but this does not extend to officiating judge advocates, appointed by officers commanding the forces abroad) to administer an oath to witnesses before any commissioners appointed to examine any matter concerning any military affairs whatsoever.⁴

Duties undefined and dependent on the order of formation;

333. The duties of courts of enquiry are undefined; they depend on the instructions which the authority convening the court may think proper to give. A court of enquiry, deriving its power from the express authority of the officer convening it, may be invested, as to enquiry and the examination of persons who may be called before it, with any authority, not exceeding that possessed by that officer; and may be re-assembled as often, and with such alteration in its composition, as he may direct.

not a judicial body; has no power to administer oaths;

334. A court of enquiry is not, in any light, to be considered as a judicial body; nor has any court of enquiry, except that to record the illegal absence of soldiers, hereafter mentioned, (§ 437) any power to administer an oath, nor is there any process by which, in this, or in any other case, to compel the attendance of witnesses not military. And even the controlling power over military men, which compels their attendance before courts of enquiry, arises from the order of a superior officer, and not from any authority, either inherent or communicated, which courts of enquiry may be supposed to possess. A court of enquiry is rather a council than a court, which any officer in command may take advantage of, to assist him in arriving at a correct conclusion on any subject, on which it may be expedient for him to be thoroughly informed. It is sometimes employed to receive and methodize information only; at other times, to give an opinion also on any proposed question, or as to the origin or cause of certain existing facts or circumstances. The transactions relating to an armistice and conventions;⁵ the causes leading to the failure of an expedition, sometimes with, at other times without, a direct allusion to the commander or

civil witnesses not compelled to attend.

Use and application of courts of enquiry;

(4) Letters patent. Appendix VII. As to administering oaths, see 14 & 15 Vict. c. 99, s. 16.

(5) Court of enquiry relative to the conventions and armistice in Portugal, 1808.

other general officer employed, have been submitted to the investigation of a court of enquiry, a strict examination having been enjoined, and a report and opinion required. When facts, attaching to the conduct of individuals, are submitted to the investigation of courts of enquiry, with a view to ascertain the expediency of a court martial, it would seem to accord with ordinary conceptions, as with justice, that the opinion, if any be required, should be confined to that particular point; especially if it express the necessity of trial, since the information may be *ex parte*, and must, from its nature, be inconclusive.

335. Although an officer cannot refuse to obey an order directing him to appear before a court of enquiry, charged to enquire into his conduct, yet he may object to take any part in the proceedings, and has a right to decline answering any questions or making any statement which may, in his opinion, be prejudicial to him in the course of any ulterior enquiry into the affair. This is most clearly laid down in the general order promulgating the sentence of a court martial on Assistant-surgeon Walsh, of the Royals, who was tried in 1809, on six charges, and most honourably acquitted of each; the third being for disobedience of orders, in refusing to attend in the mess room of the Royals, having been ordered to do so by his commanding officer, for the purpose of answering to a charge of having broken his arrest. "With regard to the third charge, His Majesty was pleased to remark, that although the opinion of the court might be acquiesced in, yet it appeared that the prisoner was not free from all imputation of blame, for the conduct upon which that charge was founded, inasmuch as it was the duty of Assistant-surgeon Walsh to have obeyed the order of his superior officer, Colonel Hay, as far as that order required his attendance before the court of enquiry, as the compliance with it would not (as the prisoner had erroneously conceived) have precluded him from the right of declining to answer any questions, or to make any statement, which might, in his opinion, have proved prejudicial to him in the course of any ulterior enquiry into his conduct."⁶ It is a characteristic of all British jurisprudence, that the accused shall be pro-

when assembled to ascertain the expediency of trial.

An officer cannot refuse to attend a court of enquiry, but may decline to answer questions, or to take part in proceedings.

(6) G. O. Horse Guards, 3rd July, 1809.

tected from answering any questions which may tend to criminate himself.⁷

Right of accused to be present at a court of enquiry;

336. Courts of enquiry, as a general rule, sit with closed doors. It is said that the accused has no positive right to be present at an investigation, by a court of enquiry, into circumstances affecting his character; yet the regret of a court martial, (embodied in their judgment,) that the prisoner had not been present and heard before a court of enquiry, which had been ordered to investigate the circumstances which led to the charges before the court martial, has been (as part of the opinion) approved by His Majesty.⁸ The accused, attending the investigation, may either answer any questions put to him, or refuse to answer, if he pleases; may either avail himself of the opportunity to explain any particular act, or any part of his conduct, on which an imputation prejudicial to him may have arisen, if he should think it expedient to do so, after being cautioned that any statement he may make may be made use of against him; — or he may reserve his defence or exculpation, submitting a request for trial by a court martial. The attendance of the accused can scarcely fail to benefit him in the event of trial, as he will have ascertained, to a considerable extent, the substance and nature of the evidence to be brought against him; and any material discrepancy between the testimony of a witness before the court of enquiry and court martial may be employed to impeach his credibility.

but has no other established claim.

337. The accused appearing before a court of enquiry cannot claim permission to ask any questions, nor to produce any testimony; nor has he any right to insist on the attendance of counsel, and further it is not usual to permit the

(7) The above stands as in earlier editions. In remarking upon a later case, where the matter enquired into was such as to subject the officer, who was implicated, to a criminal prosecution, the then judge advocate general observed, that "he ought to add that should not have been sub-

jected to an examination before the court of enquiry; so far from it that even if he desired he should have been cautioned that what he then said might have been given in evidence* against him, which caution should have been recorded on the proceedings."

(8) G. O. No. 238.

* It may be remarked that this refers to the criminal prosecution. See hereafter a very decided opinion as to the injustice of receiving against a prisoner before a court martial

evidence of anything said or urged in the course of the proceedings of a court of enquiry:—Under the head "Admissions before courts of enquiry," § 1012.

presence of a professional adviser in any case before courts of enquiry.

338. Courts of enquiry, deriving their existence from the will of a superior, and not being regulated by any statute, or any order of the sovereign, excepting that which may issue on a particular enquiry, may consist of any number of officers; three, five, or even two, have been associated on such duty; the rank of the members is also unfixed; it is usually equal, or superior, to that of the officer whose conduct or character may be implicated in the investigation. A court of enquiry, when assembled by order of the sovereign or the commander in chief, has been sometimes attended by a judge advocate, at other times not. It may be either open or close, depending in this, as in every particular of its constitution, on the will of the officer convoking it. The informations, and, when required, the opinion of the court collectively, at other times of each individual, is reduced to writing.⁹ The proceedings are forwarded to the convening authority by the president. They are ordinarily signed by each member; yet this, as other forms relating to courts of enquiry, is unsettled; the proceedings have occasionally been signed by the senior member, as president. On the court of enquiry which was held in 1832, to investigate the case of Private Somerville, of the 2nd Dragoons, the proceedings were signed by each member. This may serve as a safe precedent, as the court of five members consisted of three general officers, one colonel, and one lieutenant-colonel, and was attended by the judge advocate general.¹

Composition
of courts of
enquiry.

Proceedings
reduced to
writing,

ordinarily
signed by
each member,
by way of
attestation.

339. It has been laid down, as upon authority,² that "a charge cannot be sent to trial which has retrospect to a period of more than three years (*vide* mutiny act,) but a court of enquiry may be ordered after a lapse of any period." If this opinion had been to the effect that the power to order a

Appointment
whether
limited as to
time.

(9) See court of enquiry relative to the evacuation of Portugal, 1808; a member, Lord Moira, on this occasion, gave an argumentative and detailed opinion.

(1) G. O. No. 508. The Queen's regulations for the naval service require the sentence of a naval court martial to be signed by every member of the court, "*by way of attestation*, notwithstanding any difference of opi-

nion there may have been among the members."—*Chap.* xi. 18; p. 101.

(2) James' Tytler, *Advertisement*, p. xv. It does not appear that this was an opinion given by Sir Charles Morgan, but rather to be one of the several cases growing out of the decisions of recent courts martial which the editor (*see* his *Advertisement*, p. ix.) subjoined to Sir C. Morgan's observations on the first edition of the work.

court of enquiry, after the lapse of the period defined by the mutiny act, was confined to the sovereign, no remark would have been offered on the subject. As it is the prerogative of the crown to dismiss officers from the service, without affording them any public opportunity of justifying their conduct, it must undoubtedly, in some sense, be considered a mark of royal favour, that an officer should have extended to him an opportunity, such as a court of enquiry may yield, of exculpating himself from the charges brought against him, and of regaining the royal confidence. But the assumption of such power by any authority, subordinate to the crown, must be unjust and oppressive, if not illegal. The main object of a court of enquiry, ordered by authority less than supreme, is to enable an officer in command to arrive at a correct conclusion, as to the necessity of convening a court martial. Such pretext cannot possibly, under any circumstances, exist where the facts to be enquired into are of a date beyond the retrospection of a court martial. This the mutiny act limits to three years, except in cases of impediment to trial, and then to two years after the impediment shall have ceased. It is not to be presumed or imagined that any motive, but the honour of the army and the benefit of the service, can influence the crown to establish a court of enquiry under any circumstances, or after any period; but it is too true, that other motives may possibly actuate commanding officers, who, in their daily intercourse with the world at large, are brought in contact, and by the usages of society, placed on a footing of equality with the same men, whom, on points of duty and on parade, they are called on to command and to control. The evidence, or rather information, before a court of enquiry may, as already observed, be entirely *ex parte*; at all events, the character of an officer is not protected, however invidious the attack, by the solemnity of an oath; nor can he, under any circumstances, after the time limited for a court martial by the mutiny act, obtain a hearing of his case by any tribunal competent to decide on it. Surely then, justice forbids investigation by a court of enquiry, which may countenance malicious accusations, of which it cannot pave the way for trial, or give rise to and foment prejudices, which it cannot allay; and particularly, as the members who compose the

court, if such it can be termed, are so limited in number, not subject to challenge, and irresponsible to any superior tribunal for the opinion they may give.

Courts of Enquiry held under Articles of War.

340. The thirteenth article of war, as altered in 1860, has substituted a regimental court of enquiry for the regimental court martial, which until then had been held for the purpose of hearing the complaints, and redressing the wrongs of non-commissioned officers and soldiers "in any matter respecting their pay or clothing by the captain or other officer commanding the troop or company." It must however be understood, that in conformity to the custom of the service, the soldier ought first to address himself to his captain or the officer commanding his troop or company, and it is only on not receiving at his hands the redress to which he may conceive himself entitled, that he is authorized to apply to the commanding officer of the regiment. It would appear that considerable license is permitted to the soldier, as, upon his representation, the commanding officer *is required* to summon a regimental court of enquiry, the opinion of which he can obtain without the risk of punishment.

Court of enquiry, for doing justice on the complaint of soldier, as to his pay or clothing.

who is protected in seeking redress.

341. It is evident, from the wording of the article, that the wrong here intended must resolve itself into some claim not admitted by the officer, or some charge against his pay objected to by the soldier. It would not be competent to a regimental court of enquiry, thus summoned, to enter upon an enquiry as to a charge of tyranny and oppression, or ill-treatment, brought forward against the captain or officer commanding a company, and arising out of the ordinary connection of an officer and a soldier, as from duty in the field or under arms. Such complaints must be preferred in the usual course to superior officers, and, in their discretion, are referred to a court, convened for the trial of the accused, and competent to award punishment on conviction. The regimental court of enquiry is solely for the purpose of determining whether the complaint, as to the matters of account contemplated by the article, is just, and the opinion must be confined to the merits of the complaint, and simply state whether or not it be well founded, and to what extent.

The wrong contemplated arises in the interior management of a company,

and not out of the more enlarged connection of an officer and soldier.

Either party
may appeal

to a general
court martial
for its deter-
mination,
which

1, confirms,
2, or simply
dismisses the
appeal,
3, censures the
appellant, or
4, punishes him:

which deter-
mination must
be confirmed
in the usual
manner.

Remarks by
court.

Court of
enquiry on
case of soldier
maimed or
mutilated.

342. From the award of this court of enquiry either party, the soldier alleging or the officer charged with doing the wrong, "may, if he thinks himself still aggrieved, appeal to a general court martial, and such court shall hear and determine the merits of the appeal, and after determining the same, and after allowing the appellant to show cause to the contrary by himself and by witnesses, if any, may either confirm the appeal, or dismiss it without more, or may, if it shall think fit, pronounce such appeal groundless and vexatious, and may thereupon sentence such appellant to such punishment as a general court martial is competent to award."

343. The proceedings of general courts martial held on appeal from a regimental court of enquiry are reported, as in other cases, to the officer authorized to confirm the sentences of general courts martial, and by the intention, if not by the terms, of the oath taken by the members, they are precluded from divulging the determination of the court, until it has been duly approved.

344. When the court decides against the appellant, it may³ add that the appeal did not appear vexatious, and it would seem to be very desirable to do so in all cases of a well-disposed appellant, "who might have entertained an honest but erroneous impression of his case."

345. The eighty-sixth article of war directs that any soldier, whether on or off duty, who shall become maimed, or mutilated, or injured, except by wounds received in action, shall be forthwith brought before a court of enquiry. The court reports their opinion whether such maiming or mutilating or injuring was occasioned by design, and if the court reports that the maiming or mutilating or injuring was not occasioned by design, the soldier is not liable to be called to account in respect thereof. If the court reports their opinion that such maiming or mutilating was occasioned by

(3) Opinion of a general court martial held at the Castle, Cape Town, 23rd February, 1831, confirmed by Lieutenant-General Sir G. Lowry Cole, &c., &c. "The court having maturely considered the evidence and weighed the circumstances brought before it, is of opinion that the charge of ten shillings and sixpence has been justly

debited against the appellant, Private Murdoch Finlayson, of the 72nd Highlanders, and does therefore confirm the award of the regimental court martial, held on the 16th inst., though the court, in passing this opinion, acquits the appellant of having made a vexatious appeal."

the designed and wilful act of such soldier, or by any other person at his instigation, with intent on the part of such soldier to render himself unfit for the service, and not by accident, in that case the article requires that he shall be forthwith put upon his trial before a *general, district, or garrison* court martial on a charge for *disgraceful* conduct.

346. The proceedings of the court of enquiry and of the court martial, when held, are transmitted through the judge advocate general, to the commander in chief, and afterwards by the secretary for war to the commissioners of Chelsea Hospital, in order that they may, when the case comes before them, have the best means of arriving at a just decision, either to grant or withhold a pension.

Proceedings
how dealt
with.

347. The hundred and seventieth article directs that if any soldier shall have been illegally absent from his duty for the space of *two months*, a court of enquiry of *three* officers shall forthwith assemble, and empowers them to examine witnesses upon oath respecting the fact of such absence. Having received proof on oath of the fact, they declare such absence and the period thereof, and the officer commanding the corps enters a record of such absence, and of the declaration of the court of enquiry thereon, in the regimental books. If such soldier should not afterwards surrender or be apprehended, the record has the legal effect of a conviction for desertion: — and if the soldier should surrender or be apprehended after the record has been so entered, such record, or a copy thereof, purporting to bear the signature of the officer having the custody of the regimental books, shall, on the trial of such soldier on a charge for desertion, be admissible in evidence of the facts therein recorded (§ 177); and on proof of the identity of the prisoner with the soldier therein mentioned, he may be found guilty of desertion.

Court to
record illegal
absence,

empowered to
administer
an oath.

Record has
effect of
conviction of
desertion in
certain cases,
and is legal
evidence on
trial for
desertion.

348-9. The Queen's regulations,⁴ as revised in 1859, direct that with a view to prevent any officer⁵ who may have been taken prisoner by his own neglect, or any other unofficer-like conduct, from obtaining any advantages of promotion after his exchange or release, a court of enquiry is, as soon

Court of en-
quiry on re-
turned prisoners
of war.

(4) Queen's Reg., p. 76.

(5) In the case of a soldier, as required by the eighth section of the Army Service Act, and by the 174th

Article of War, due enquiry is made by a court martial upon his rejoining the service.

as possible, to be assembled by order of the general officer commanding the forces, to investigate the circumstances under which he was taken ; and, having sifted the facts as far as may be in their power, they are to state their opinion whether his capture is to be attributed to the chance of war to which he was exposed, or whether it occurred from any unofficer-like conduct on his part. The president and members of the court are to make a prescribed declaration previously to commencing the proceedings. The proceedings of the court are to be transmitted by the general officer in command of the forces to the military secretary.

CHAPTER X.

PROCEEDINGS ON COMMISSION OF OFFENCES, SUMMARY
DISPOSAL OF COMPLAINTS.

350. THE seventeenth article makes provision for the apprehension of officers and soldiers accused of capital and other crimes punishable by law. This is enforced by the hundredth article of war against refusing assistance to the civil magistrate, and by the seventy-sixth section of the mutiny act as to the "punishment of officers obstructing civil justice" on application being duly made to them.

Ordinary course
of criminal
justice not
to be interfered
with.

351. The eighteenth article of war directs that "whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, be put in arrest, if an officer; or, if a soldier, be confined until he shall be either tried by a court martial, or shall be lawfully discharged by a proper authority; and no officer or soldier, who shall be put in arrest or confinement, shall continue in such arrest or confinement more than *eight days*, or until such time as a court martial can be conveniently assembled." This provision is farther enforced by the seventy-eighth article, which renders an officer liable to cashiering who, "shall unnecessarily detain any prisoner in confinement without bringing him to trial." The effect of this article may be ascertained by considering the proof which may be necessary to maintain a charge under it: it would be sufficient to prove that the prisoner had been confined for a period *exceeding eight days* when a court martial might have been conveniently assembled, without adverting to the culpability of the individual confined; but, if a charge were grounded on it, for detaining a prisoner in confinement for any time *less* than eight days, it must be proved that the offence imputed to the prisoner was of a nature not admitting or justifying a trial, or that the commanding officer was aware of his in-

Arrest and
confinement.

Time limited.

Penalty on
unnecessarily
prolonging;

may be prolonged to induce reflection.

nocence, and, *therefore*, the detention unjust. A commanding officer may act for the advantage of the service, for the furtherance of discipline, and with lenity towards a prisoner guilty of a military offence, by keeping him for a time¹ in suspense as to the ultimate steps to be taken respecting him, and finally, by deciding on his release without trial. The articles of war appear to provide for such cases, by the permitting, to the extent of *eight days*, a confinement at the discretion of commanding officers.

ARREST of an officer.

352. An officer is put in arrest either directly by the officer who orders it; or more generally by the ministration of a staff officer, — an officer of the general staff when the arrest is directed by a superior officer and not through the channel of the commanding officer; — by the adjutant or a field officer of the regiment, when ordered by the commanding officer; arrests have occasionally been imposed by the intervention of the provost marshal, and, more rarely, notified even in public orders.

Form of imposing.

353. On being placed in arrest, an officer resigns his sword to the person imposing it; if this form be sometimes omitted, it is considered, nevertheless, to have taken place, and hence the custom that an officer in arrest does not wear a sword.

Degrees of arrest;

354. An officer in arrest is to all intents and purposes a prisoner, but the arrest may be either close; or at large, if extended by the express permission of the authority who may order it. The Queen's regulations on their last issue enforced the established custom of the service in the following terms: "An officer in close arrest is not allowed to leave his quarters or tent. If he be in arrest at large, he may be permitted by superior authority to take exercise within defined limits, viz, not beyond the barracks, or, if in camp, not beyond the Quarter Guard, and then only at stated periods; but he cannot dine at his own, or any other mess, nor is he to appear at any place of amusement or public resort, and is on no pretext to quit his room, or tent, dressed otherwise than in uniform, without his sash and sword."²

(1) In the case of *soldiers*, they are not to be kept in confinement for a longer period than *forty-eight* hours, without having their cases disposed of,

unless it be preparatory to a court martial.—Queen's Reg. p. 122.

(2) Queen's Reg p. 221. Circular, Horse Guards, 19th Sept. 1859.

355. Officers in arrest are ordinarily considered on parole, but when accused of having broken their arrest, or of any heinous offence, the penalty of which might induce a desire to escape from justice, they have been placed in custody of the provost marshal, or in charge of a sentry. An officer, by being placed in charge of a provost marshal, or by having a guard placed over his quarters, is not thereby freed from the responsibility of arrest,³ nor can an officer commanding such guard permit the officer in his charge to leave his place of confinement under the impression that the security of his prisoner is all that is required of him.⁴

on parole,
even when in
charge of a
guard.

356. A court martial has no control over the nature of the arrest of a prisoner, except as regards his personal freedom in court; they cannot, even with a view to facilitate his defence, interfere to cause a close arrest to be enlarged. The officer in command is alone responsible for the discharge of this duty, and an officer has been justified by His Majesty, in refusing to accede to the suggestion of a court martial to grant a prisoner such indulgence as might facilitate the examination of witnesses, and thereby enable him enter earlier on his defence.⁵

Court martial
cannot control
the nature of.

357. A senior officer is liable to arrest by his junior, not only in cases of quarrels, frays and disorders,⁶ which case is specially provided for by the articles of war, but for any glaring impropriety, as drunkenness on parade, which is most clearly evinced by the order on the promulgation of a court martial held for the trial of Brevet Lieutenant-colonel Alexander Hog, major in the 55th regiment of foot,⁷ "for being drunk on duty when under arms inspecting the guards and picquet of the 55th regiment of foot, at Plymouth, on or about the 9th of October, 1819." The court after the finding and sentence, whereby Lieutenant-colonel Hog was found guilty, and sentenced to be cashiered, proceeds, "The

A senior officer
in certain cases
liable to arrest
by his junior,

(3) Art. War, 73.

(4) G. O. Sept. 13th, 1831, by Lord Dalhousie, when commander in chief in India, on the promulgation and remission of the sentence of courts martial on Lieutenants Naylor and Williams, of the 8th N. I. Lieutenant Naylor was cashiered for breaking his arrest; and Lieutenant

Williams was cashiered, for that he, when commanding a guard over a prisoner committed to his charge, did allow such prisoner (Lieut. Naylor,) to leave his place of confinement.

(5) G. O. No. 234.

(6) Art. War, 15, 44.

(7) G. O. No. 453.

court conceives that it would be a dereliction of duty, were it to pass unnoticed so extraordinary and (as far as the experience of the court extends) unprecedented an occurrence, as that of a commanding officer being put under arrest, while in the actual command of a regimental parade, by a junior officer of the corps. In making this observation, the court does not presume to take upon itself the authority of commenting upon so delicate and highly important a point of military discipline, further than to remark, that the circumstances detailed in evidence upon the proceedings of the court, were not, in their nature, of that imperious urgency, as to have called for the immediate adoption of so very strong a measure. And further, that it does not appear to the court that Captain Elligood, or the officers who were called upon by Captain Nicholson to consult upon the subject, were actuated by any spirit of insubordination, private pique, or malice, towards Lieutenant-colonel Hog; but were influenced in their conduct by feelings of zeal for His Majesty's service, and the immediate honour of the regiment." His Royal Highness was pleased to confirm the finding and sentence, but permitted Lieutenant-colonel Hog to receive the regulated value of his commission, and was further pleased to command it to be signified, "that though the observations of the court upon the nature of Lieutenant-colonel Hog's arrest are no doubt founded upon the best motives, yet it is impossible to let them go forth to the army without explaining that the court are in error when they suppose that circumstances may not occur, even upon a parade, to justify a junior officer in taking upon himself the strong responsibility of placing his commander in arrest: such a measure must alone rest upon the responsibility of the officer who adopts it, and there are cases wherein the discipline and welfare of the service require that it should be assumed. In the present instance, the sentence of the court appears to afford a full justification of Captain Elligood's conduct in the placing of Lieutenant-colonel Hog in arrest; though it would have been more regular, if that officer had continued to rest upon his own responsibility, without calling a meeting of his brother officers to support it by their opinion."

even on parade;
a senior officer
in certain cases
liable to arrest
by his junior,

but previous
consultation
condemned.

CONFINEMENT
of private
soldiers.

358. Private soldiers are confined in charge of a guard or sentry: non-commissioned officers are in no case to be sent

to the guard room and mixed with the privates during confinement, but to be considered as placed under arrest.⁸

359. Prisoners are not to be kept in irons previous to trial: this measure was at one time frequently, though never universally, resorted to in the army, in cases of men charged with the more heinous offences, but it ought to be avoided, as, unless necessary for the safe custody or to prevent the violence of a prisoner, it is in the nature of a punishment on a man, whom the law at such times mercifully presumes to be innocent.

Men not to be kept in irons, as a matter of course, in any instance.

360. The nineteenth article prescribes, 'that no officer commanding a guard, or provost marshal, shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer belonging to the forces; and that such officer shall, at the same time, or without unnecessary delay, deliver an account, in writing, signed by himself, of the crime with which the said prisoner is charged. It is obvious that this article does not extend to the custody of prisoners who are not subject to the articles, but Lord Campbell, then chief justice of the court of Queen's Bench, in giving judgment in the case of *Wolton v. (Major) Gavin*, in which the majority of the judges concurred, stated his opinion, that the article "embraced both civil and military offences. The 18th," now seventeenth, "article applied to civil crimes, and the 19th," now eighteenth, "to military offences, but the 20th," now nineteenth, "applied to both classes of offences, the word 'crime' being used."⁹

Officer on guard and provost marshal to receive prisoners;

if subject to the act, and this whether charged with civil or military offences.

361. The provisions in this article are further enforced by the seventy-sixth and seventy-seventh articles. The seventy-seventh declares the penalties to which the commander of a guard is liable for releasing a prisoner without authority, or suffering him to escape. The seventy-sixth article guards against the undue confinement of soldiers, by requiring a written report to be made of the prisoner's name and crime, within twenty-four hours after his commitment (or, if the

Officer confining soldier, to give in a written crime.

The commander or guard must report prisoners.

(8) Queen's Reg. p. 124. A general order of the 7th Jan'y. 1862 directs "that when a non-commissioned officer or soldier has been deprived of his arms, either prior to investigation or whilst undergoing punishment for an

offence, they shall not be restored to him, except by an order of the officer commanding his company, or other superior officer."—G. O. 802.

(9) *Sittings in Banco*, 15 Nov. 1850.

guard should be relieved prior to the expiration of twenty-four hours, immediately on the relieving of the guard) to the authority competent to direct what steps may be necessary thereon; that is, to the officer commanding the garrison, if a garrison guard; or to the officer commanding the regiment, if a regimental guard.

The want of a proper crime will not justify the release of prisoner.

362. It may be observed, that the nineteenth article enjoins a duty, not only on the officer commanding a guard, or the provost marshal, but also on the officer committing a prisoner to their custody. In the first place, a refusal to receive a prisoner is provided for; in the second, the officer is required to deliver in an account, in writing, of the crime with which the prisoner is charged. It is imagined that the parts of the article, or rather the obligations created by it, are distinct. Omitting to deliver in *a crime*, as it is usually termed, will not justify the rejection, much less the release, of a prisoner, or exempt the commander of the guard from liability to the penalties attaching to an infraction of the seventy-third article; though such an idea has prevailed in the army to some extent. It is possible that an officer committing a prisoner to custody, may have grounds whereon to justify or extenuate the omission of the duty attaching to the act of committal. It is sufficient for the commander of the guard, that the prisoner is amenable to military law, and that the person confining him is known and responsible, the immediate presence of an officer confining a prisoner may be required elsewhere, and circumstances may not admit of delay. Indeed, numerous inconveniences, and such as will readily present themselves to the imagination of every military man, must arise to the service, if the reception of a prisoner invariably depended on the delivery, in writing, of an account of his offence. The case perhaps is different, and the same reasoning may not apply, as to retaining a prisoner, without a crime, more than twenty-four hours, or beyond the time when the report of the guard may be delivered, or forwarded, to a superior officer, and the prisoner turned over to a relieving guard; and yet the commander of a guard, instead of taking upon him the responsibility of the release of a prisoner, would act more prudently and more in unison with the custom of the service, if he were specially to report the name of the prisoner, together

with that of the officer or non-commissioned officer who confined him, stating that no crime has been received. It would then become the duty of the superior officer to call on the committing officer for explanation ;— to order the release of the prisoner ;— or to take such steps as may appear expedient.

363. Breaking arrest, in an officer, is punished, on conviction, by cashiering peremptorily. Breaking confinement, in a soldier, is punishable at the discretion of the court before which the offence may be tried.¹

Breaking arrest, how punished.

364. Besides the ordinary modes of securing offenders against military discipline, the mutiny act² provides for the apprehension by the civil power of persons suspected to be deserters, and for the after-disposal, in civil or military custody, as may be expedient, of any person, whether officer³ or soldier, whom the justice may have reasonable grounds for believing to be a "deserter." It also enacts, that whenever troops are called out in aid of the civil power, or are stationed in billets, or are on the line of march, that the commanding officer may require, by a written order to that effect, the governor or keeper of any prison, lock-up house, or other place of confinement, to receive into his custody any soldier for a period not exceeding seven days.⁴

The mutiny act provides for the apprehension of deserters,

and confinement in civil custody of soldiers when not in barracks.

365. All complaints should be immediately investigated by competent authority. The idea of trial by a court martial being abandoned, commanding officers are restricted from keeping a soldier in confinement for a longer period than forty-eight hours ;⁵ and, in accordance with the spirit of the order which enforces this limitation, it is incumbent on commanding officers, generally speaking, to determine within that period as to the measures to be taken with an offender, that is, whether he shall be brought to a court martial, or dealt with in their discretion.

The case of prisoners or offenders must be enquired into, without delay.

(1) Art. War, 73.

(2) Mut. Act, sec. 34.

(3) In the mutiny act of 1847 and subsequent years "deserter" has replaced "soldier." Captain Archibald Douglas, 49th Madras Native Infantry, was committed as a deserter on the 4th Nov., 1842, and, being brought up by writ of *Habeas Corpus* before the court of Queen's Bench on the 14th of

the same month, was discharged, because it was objected he was not within the 22nd section (corresponding to the present thirty-fourth), which specified "soldier."—3 *Q. B. Reports*, pp. 825—831.

(4) Mut. Act, sec. 30.

(5) Queen's Reg. p. 122. See also § 351.

Case of a soldier,
how disposed of
without trial:

366. The further proceedings in those cases, which are reserved for a court martial, are discussed in the subsequent chapter. When the commanding officer has not any intention of bringing an offender to a court martial, he may order such of the minor punishments mentioned in the Queen's Regulations as he may think fit. They point out with regard to this, that it would be inconsistent with subordination that he should admit of the *right* of option or appeal, except where the soldier has a right to demand a court martial, instead of submitting to a forfeiture of his pay, although he may, if he think proper, vindicate the justice of his first order by resorting to the alternative of a court martial.⁶

except in cases
where pay may
be interfered
with:

367. The only exception to this regulation, which, as a general rule, is most essential to the maintenance of discipline and upholding the authority of the commanding officer, arises from a general principle of not touching the soldier's pay without giving him an appeal to a court martial, in which those who have had to do with soldiers, and know their feeling on this point, will not fail to recognize a wise and practical discrimination on the part of the authorities. The eighth article of war, which requires that a commanding officer, upon proof of the misconduct of any officer or soldier in billets, should cause reparation to be made either by bringing the offender to a court martial or stopping half his pay, until reparation be made, provides that "if the officer or soldier shall protest against such summary proceeding of his commanding officer, the matter shall be enquired into, and, if necessary, tried before a competent court martial." The fifty-fifth article of war provides that a soldier "ordered by his commanding officer to suffer imprisonment" (necessarily entailing a forfeiture of pay during its continuance) "or deprivation of pay, shall, if he so request, have a right to be tried by a court martial for his offence, instead of submitting to such imprisonment or deprivation."⁷

in the case of a
summary order
to make pecuni-
ary reparation
for misconduct
in billets,

or of a soldier,
objecting to
summary awards
under the
articles of war.

An officer, if
released from
arrest, has
necessarily no
right to insist
on trial,

368. The Queen's regulations point out, that "an officer who may be placed in arrest, has no right to demand a court martial upon himself, or to persist in considering himself

(6) Queen's Reg. p. 122.

(7) The revised good conduct regulations, War Office, 10th Sept. 1860, do not give an appeal to the soldier

denying the commission of an offence, the punishment for which, other than imprisonment or deprivation of pay, constitutes him a regimental defaulter.

under the restraint of such arrest, or to refuse to return to the exercise of his duty, after he shall have been released by proper authority." They further declare: "It by no means follows that an officer, considering himself to have been wrongfully put in arrest, or otherwise aggrieved, is without remedy; a complaint is afterwards open to him, if preferred in a proper manner, for which provision is made by an article of war."⁸ The terms of this regulation are extracted from an order of His Royal Highness the Duke of York, dated 1st February, 1804, in which it is also stated, that an officer cannot insist upon a trial, "unless a charge is preferred against him." The authority competent to direct the release of an officer must be the officer who imposed the arrest, or the superior to whom it may have been officially reported. It is imagined, that an officer could not, under any circumstances, persist in considering himself under the restraint of an arrest, when released therefrom by the superior officer who imposed it; nor could he decline to return to the exercise of his duty; but he may remonstrate, and the custom of the service, supported as it is by the above quoted order of his late Royal Highness the ever to be lamented Duke of York, would certainly justify the supposition that *charges having been exhibited* against an officer, he could not, on representation to the proper authority, be refused a trial by a court martial, or such an explanation as might be satisfactory to his feelings. A trial under these circumstances would be an obvious exception to the rule ordinarily acted on, that courts martial may not enter upon charges which have been extra-judicially disposed of already.⁹

unless a charge
has been
preferred.

Who may
remove an
arrest.

Improper to
prefer charges
previously
disposed of
summarily.

369. The twelfth article of war, quoted above, runs thus: "If an officer shall think himself wronged by his commanding officer, and shall, upon due application made to him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding in chief of our forces, in order to obtain justice, who is hereby required to examine into such complaint; and, either by himself, or by our secretary at war, to make his report to us thereupon, in order to receive our further directions." The words "*not receive the redress to which he may consider him-*

Redress of
wrongs,

of an officer.

(8) Queen's Reg. 220.

(9) See hereafter, case of Captain Halliday, § 562.

self to be entitled," have superseded those "*be refused to be redressed;*" the alteration removes the possibility of doubt, as to the right accorded to an officer of complaining to the general commanding in chief, on not receiving *satisfactory* redress. Before this emendation of the article, it was conceived that a neglect of an application for redress amounted to a virtual refusal, but the degree of neglect justifying a direct address to the general in command being undefined, an officer seeking redress was exposed to the inconvenience which might arise from a difference of opinion on the subject.

Superior officer
has no positive
power to dispose
of complaint.

Redress of
wrongs,
of an officer.

370. It appears that the general officer commanding in chief has no power authoritatively to dispose of the complaint of an officer who may think himself wronged by a commanding officer, but is required to examine into such complaint, and to make his report, either directly or through the secretary for war, to the Queen. Successive sovereigns, thus reserving to themselves the right of judging on such questions as may affect the feelings of their officers, have secured to them that consideration to which as the bearers of their commission, they are entitled, and have fostered that refined and gentlemanlike feeling for which, amongst the armies of Europe, they are so distinguished. It is not, however, to be imagined that a general officer is required, under all circumstances, and without expressing his view of the case, to convey to the throne the complaints of an officer against his superior; even the expression of an opinion, by the intermediate general officer, after due enquiry, is, in most cases, sufficient to render such proceeding unnecessary. The case must be peculiar which would exempt an officer from the imputation of pertinacity, on persisting in the furtherance of an appeal in opposition or disregard to the opinion of the commander in chief. The consciousness in an officer, that he possesses the right of requiring his complaint to be laid at the foot of the throne, may of itself tend to mollify his real or imaginary wrongs, and render him satisfied with minor redress or explanation.

Channel to be
observed in
preferring a
complaint.

371. It is the custom of the service to forward every complaint through the officer commanding the regiment; nor would an officer be justified in deviating from this course, unless the commanding officer should refuse, or unreasonably

delay, to forward it. An officer, on addressing himself directly to the general in command, should apprize his commanding officer of the same, and must obviously observe in the channel of approach to the commander in chief each gradation which may lead to him, as the general of brigade or division.

372-9. The redress of wrongs in a soldier, arising out of the relative connection between a soldier and the commanding officer of his company, is noticed when speaking of regimental courts of enquiry (§ 340). The mode of preferring a complaint is well set forth in the form of a soldier's personal account book, which was first issued by Lord Hardinge, when secretary at war. It can never be too strongly inculcated, that individual complaints only, in the army, are admissible; that the combined complaint of several must be considered factious, and is, in its nature, mutinous: that no complaint can be legitimately preferred to a superior officer, without observing the regular channel of access to him; and that if the person against whom the complaint is, be a link in the chain of approach to the higher authority, he is equally to be resorted to as the channel of communication. If he refuse, or unnecessarily delay, to forward the complaint, or to repair the injury satisfactorily, the more direct path is open to the complainant; but he would act prudently, and do well, to make the intermediate authority acquainted with the adopted measure. There are periodical exceptions to this long established channel for the redress of wrongs of non-commissioned officers and soldiers; it arises from the question which general officers are required, on their half-yearly inspections, to put to regiments, as to whether there are any complaints. It would, however, appear better to accord with the original intention of this question, if the complaints thus brought to the notice of the supreme authority were confined to any *claims* which soldiers may have to make, rather than to extend it to *wrongs* of a personal nature. It may be argued, and fairly too, that a soldier has no wrong to redress until he has sought satisfaction in the prescribed channel; still it must be admitted, that this is not the ordinary interpretation placed on the order; it is usually received in the most unrestricted sense, and held to refer both to accounts and discipline; and it

Redress of
wrongs,
of a soldier.

Prescribed mode
of preferring a
complaint.

Exception at
half-yearly
inspection.

appears most desirable on every account that there should be no restriction on the exercise of this privilege, rarely exercised indeed, but still most highly prized by the soldiers, except in the case of an attempt to abuse it, by making it a pretext for insubordinate language or the vehicle for personal slander.

CHAPTER XI.

PRELIMINARIES TO TRIAL BY COURTS MARTIAL.

380. COURTS martial are decided upon by superior authority, or where a complaint against an officer or soldier is not summarily disposed of, commanding officers of regiments or detachments submit an application to the superior officer, or, in the case of a soldier, of their own authority, assemble regimental or detachment courts martial, when the offence is within the cognizance of this description of court, and does not appear to require more serious notice. An article of war (§ 265) prohibits their giving in vague and indefinite charges against a soldier, and thus trying grave offences before a court of inferior jurisdiction, and commissioned officers can in no case be tried by any minor court martial. In the case of an offence, cognizable, either by a general court martial, or by a district or garrison court martial, except in the special cases where a detachment general court martial may be assembled beyond the seas, the authorities, specially empowered to convene these courts martial respectively, can alone assemble a court for the trial of an offender, or, in the exercise of their own discretion, give permission (§ 263-8) for his being tried by a district or garrison court martial, or by a regimental court martial, as the case may be, which permission is laid on the table of the court as their authority for entertaining the charge.

Steps to be taken when a case requires a court martial,

regimental,

district,

or general.

The charges must not be indefinite,

must be investigated by a competent court,

381. Commanding officers should be guided in their decision as to the necessity of bringing a soldier to a court martial, by the character of the individual, his conduct, the nature and degree of the offence, its prevalence at the time, and also by the probability of conviction: and moreover the Duke of Wellington, then commander-in-chief, expressly enjoined "that when commanding officers may think it neces-

not preferred unnecessarily,

and not include offences which might have been disposed of summarily.

sary to bring officers and soldiers to a court martial on charges of a serious nature, they should as much as possible avoid including in them any offence which the commanding officer would in the ordinary exercise of his discretion, punish on his own authority without the intervention of a court martial."¹

Charges must

be neither groundless,

nor delayed.

382. In preferring charges it must ever be right to consider that "to prefer accusations which cannot be maintained, at the same time that the practice is highly inconvenient and injurious to the service, reflects much disgrace upon those who bring them forward."² It is equally to be observed, that an officer has failed in his most essential duty to the service, by *delaying* to bring forward charges, and that permitting charges to lie dormant, justifies the impression that the prosecutor is not actuated by public motives alone, in their institution.³

The superior officer has a discretionary power,

except in the case of a soldier, becoming mutilated with intent to unfit himself for the service.

383. The only case, in which under the existing articles of war no discretionary power is lodged in the officer, whose duty it is to order a court martial, is when a soldier, whether on or off duty, has become maimed, mutilated, or injured except by wounds received in action, and the court of enquiry, before which he has been brought, report their opinion that this was occasioned with intent, on his part, to render him unfit for the service, the eighty-sixth article then peremptorily directing that he "shall be forthwith put upon his trial before a general, district, garrison court martial on a charge for disgraceful conduct."

Circumstances investigated by superior authority.

before court martial ordered,

384. All charges preferred against an officer or soldier, and the circumstances on which the charges are founded, are to be previously examined by superior authority⁴ in order to its being ascertained that they are such as should be submitted to the cognizance of a court martial and that there is sufficient evidence to substantiate them.⁵

385. It is not to be supposed that the crime given in when soldiers are confined, or charges against officers, drawn

(1) Horse Guards, 23rd April, 1847.

(2) G. O. Horse Guards, 7th May, 1801.

(3) G. O. Horse Guards, 12th March, 1813.

(4) See special provision as to

schoolmasters, § 63, note.

(5) Queen's Reg. p. 222. A printed form is established for applications for general, district, or garrison courts martial on soldiers.—W. O. Form, 733.

up by those who may prefer them, are to go in that state to trial; but they may be framed and altered in such way as the officer, who is to order the trial, may think best, both in regard to the substance and in other respects.⁶

and the charges examined to ensure their being in a shape proper to be investigated.

Framing the Charges.

386. The judge advocate general on the trial of Colonel Quentin very clearly pointed out the general principle which is applicable to this subject: "It is well known by everybody, that in the case of charges brought before a court martial, they are not bound to the technical formalities which prevail in other courts of law; but there is this essential principle in every charge, before any court that can exist in the civilized world, that the charge should be sufficiently specific to enable the person to know what he is to answer, and to enable the court to know what they are called to enquire into."⁷ Some few observations, therefore, as to framing of charges, may not be misplaced; for though it is neither necessary, nor even desirable, to copy from the technical formality of courts of law, yet, where the observance of certain rules is essential to enable a prisoner to grapple with the charge, they become inseparable from justice, and ought on no account to be disregarded.

General principle to be observed in drawing up charges.

387. It is required that "in framing charges, the utmost care is to be taken to render them specific, in names, dates, and places; in charges against non-commissioned officers or soldiers, the prisoner's regimental number is to be inserted, but all non-essential minutiae are to be avoided; the *precise* hour of the commission of an offence is not to be inserted in the charge, unless it be in the essence of the offence itself, or be necessary to the prisoner for his defence,—as, for instance, in a charge "for being drunk on sentry," or, "for being asleep on," or "for quitting his post." Charges for absence without leave are to be worded, "for being absent without leave from his commanding officer."¹ In those cases where the prisoner may be placed under stoppages

Charges must be specific.

If soldier, number of regiment to be added; and other minutiae required by regulation.

(6) Sir Charles Morgan. James's Tytler, Advertisement, p. xiv.

(7) Printed trial, p. 81.

(1) Queen's Reg. p. 222. See Circular, Horse Guards, 26th May, 1855; and Art. War, 54.

(§ 689) the amount of the loss, destruction, damage, or expense, which it is proposed to recover, should be stated in the charge, except where the offender has to make good the loss or damage of arms, clothing, or articles of his kit, when it is sufficient to specify the articles in the charge.

NAMES of
prisoner;

388. Names of prisoners should be at full length and the regiment, or staff employ or department correctly stated.²

if mis-stated, do
not give rise to a
dilatory plea,

389. Pleas in abatement were never of any avail with courts martial for purposes of delay: it was always in the power of the court to permit the prosecutor to amend the charge, according to what the prisoner might aver to be his true name, or addition. This custom corresponds to the rule of criminal courts under a provision by an act of parliament³ "that no indictment shall be abated by reason of any dilatory plea or misnomer, or of want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied by affidavit, or otherwise of the truth of such plea; but in such case, the court shall forthwith cause the indictment, or information, to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded."

as to names.

Prisoner may be
charged under
an *alias*:

390. In corroboration of this custom, attributed to courts martial, the following opinion of judge advocate general, Sir Robert Grant, may be quoted: "Where the identity of a prisoner fully and indisputably appears, it is quite immaterial whether he is tried by his real name or by a fictitious name, or by both names under an *alias*. If the circumstances of his having been known by different names have arisen from mere mistake or from accident, yet the law will not permit such mistakes or accidents to defeat the ends of justice. But if he has designedly assumed a false name for a sinister purpose, then the maxim applies, that no man, whether in a

(2) No part of an indictment, except where a *fac-simile* is set out, can be in figures: this rule has been recommended to be observed in framing charges, and to the extent of dates being in words, not figures, has, at different times, been enforced by standing orders in local commands,—but there is no general regulation of the kind,—on the contrary, the forms of charges promulgated by Horse

Guards' circulars specify the dates in figures: e.g. the circular mem. Horse Guards, 31st Dec. 1851.

In writing the sentence, it is customary to employ words at length for the number of days' imprisonment, years of penal servitude, &c., and it is very usual to add figures, in parentheses, or in the margin.

(3) 7 Geo. 4, c. 64, s. 19. See § 846.

criminal proceeding or elsewhere, shall be allowed to avail himself of his own wrong." Before civil courts, if the name of the prisoner is unknown and he refuse to disclose it, he may be indicted as a person whose name is unknown, if his identity be fully ascertained.⁴ This rule may be applicable by courts martial abroad, or in the event of the proclamation of martial law.

or a prisoner
may be
arraigned

as a person
unknown.

391. Where offences are committed against or in respect of an individual, the same care must be observed in stating the name, if the person be known. If the person is not known, it must be so stated. It is no objection that the name is not the real name, if it be that by which the person is usually known, or that it is a name of office or other descriptive appellation, instead of the proper name.⁵

Name of person
in respect to
whom the
offence com-
mitted.

392. Property stolen out of the possession of a person to whom it had been entrusted may be described as stolen *from* that person; just as at common law property may be laid to be the goods and chattels either of the real owner or of the person to whom they had been entrusted. This rule is often applicable by courts martial, as in the case of money stolen from a pay master or pay serjeant, and in many other instances which it is unnecessary to particularize.

Property stolen
is in law the
property of the
person in actual
possession.

393. It is a rule at common law that property belonging to a body of persons cannot be laid in an indictment as the property of that body, unless it be incorporated, but the name of one at least of those must be mentioned, who constitute the body, as in the case of partners, trustees, or joint stock companies. No rule of this kind is regarded by courts martial; and, it may be observed that, "stealing the property of a military or regimental mess or band" are offences expressly mentioned in the articles of war.

Party injured
sufficiently
described by
name used in
common
parlance.

394. The precise hour, as directed by the regulation above quoted, (§ 387) should be inserted in the ⁶ charge only where it is the essence of the offence; but charges should always set forth the day or days of the month and year on which (or between which, if the offences were of a continuous character) the offences were committed. Or if the offence

DATES.

(4) Carrington, on Criminal Law, p. 24.

(5) See § 1166.

(6) In burglary, for example, "it is usual to state the hour, but alleging

the offence to have been committed 'in the night,' without mentioning the hour, seems to be sufficient."—Archbold's Criminal Cases, 41.

were one of omission, and the offence consisted in omitting to do an act at a particular time or place, then the charge should state that it was not done at that time and place. If the offence be done in the night, before midnight, it is understood to be done in the day before; and if it happen after midnight, then in the day after. *At or about* a certain hour, and *on or about* are frequently used; but no precise length of time is comprised in these terms. A degree of latitude depending on the nature of the offence is, in certain cases,⁷ necessarily allowed, without reference to the use or omission of any modifying words, and particularly where the time of committing the act charged is not the essence of the offence, and there is no question as to the time limited (§ 52) for preferring the charge.

Charges must be clear and simple;

395. "Charges should not be split and expanded, and the same act should not be charged under two counts, the object being to render charges before courts martial, clear and simple, comprehensible alike by the court and prisoner, without legal assistance to explain terms and technicalities."

the same act not charged under two counts,

396. At common law it is not unusual to insert two or more counts in an indictment describing the same transaction in different ways, but there is no occasion to resort to this practice in framing charges before courts martial, as, if the evidence does not support the more grave part of a charge, a court martial may convict an offender in any degree in which he may have been proved guilty.

nor a charge arising out of one transaction unnecessarily split and expanded,

397. Neither ought more charges to be preferred against a prisoner than will bring the act or acts of misconduct, about to be tried, clearly under the review of the court martial: as for example, a soldier absent at tattoo roll-call, and then resisting the picquet sent in search of him, and striking the corporal, where the violence to the superior officer in the execution of his office (an offence reserved for a general court martial) is the chief subject for consideration, need not to be tried on two charges;— *first*, For absence without leave from tattoo and not returning until brought back, &c.: and *secondly*, For insubordinate conduct in resisting the regimental picquet and striking the corporal in charge of it;—but might preferably be arraigned on one

(7) See § 850-54 as to Special Finding.

charge, For insubordinate conduct in resisting the regimental picquet sent in search of him after tattoo beating, and striking the corporal, his superior officer, in the execution of his office. "The absence without leave (out of which the violence originated) might," as was remarked by his grace the late Duke of Wellington on a case of this nature, which came under his notice in a return of courts martial, "have properly merged in the graver offence," and in that shape have come under the cognizance of the general court martial — or of a minor court, if specially authorized in the particular case.

by the addition of a charge for a minor offence;—

398. The Duke upon another occasion, where an officer, having been brought to trial upon charge of "appearing at mess in a state of intoxication and also improperly dressed," was found guilty only of 'having appeared improperly dressed,' observed upon the "loose manner" in which the charges were drawn up, the commanding officer having included in "a very grave charge, an irregularity, which it was within his own legitimate authority to have punished by rebuke and admonition without resorting to a court martial at all."

which might, in the event of an acquittal of the grave offence, unfairly subject the prisoner to consequences injurious to his character.

399. To prevent the injurious effects which result from such cases his grace "expressly enjoined that where commanding officers may think it necessary to bring officers and soldiers to a court martial on charge of a serious nature, they should as much as possible avoid including in them any offence which the commanding officer would in the ordinary exercise of his discretion punish on his own authority without the intervention of a court martial."

Principle laid down by the Duke of Wellington:

that minor offences are not to be included in a grave charge.

400. The Queen's regulations also lay down that "a simple act of drunkenness is not to form a separate charge, unless the previous repetition of the offence bring it within the category of habitual drunkenness."^s

Simple act of drunkenness not subject for a trial.

401. The practice of courts martial differs in another respect from that of civil courts, inasmuch as a prisoner may be placed on his trial, at the same time, for several offences of *distinct* natures. It is however desirable that distinct transactions should be specified as distinct instances or in separate charges, and not *blended* in the same charge. But.

Distinct offences tried at the same time but not included in one charge.

this custom of joining several offences does not extend to the joinder of military and civil offences, in those cases where the criminal law is dispensed by a general court martial, in default of a court of civil judicature; not only do the punishments differ in kind, but the sentence, for offences of these two classes, is carried into execution under different regulations.

Offenders
may be
charged
collectively.

402. Before a court martial, as in a court of civil judicature, several offenders who commit an offence in concert,⁹ may be tried either¹ jointly or separately. Thus for mutiny, sedition, riot, destruction or injury of property, and offences of a similar type, two or more prisoners may be joined in one charge (the offences arising out of the same act, design, or omission) and, having been severally arraigned, may be tried together by the same court martial. It may be added that the finding and sentence on each prisoner ought to be separate and complete; and, in cases of joint damage, the amount of stoppages to make it good, should be distributed among the offenders according to the part, which in the view of the court, each prisoner may have taken in the transaction.

Offence need
not be charged
in breach of
particular
article of war,

403. It was at one time usual to state that the crime charged was 'in breach of the articles of war,' or in breach of some particular article; but the practice has of late years become obsolete, though the words "which being in breach of the articles of war" are still very generally introduced in the wording of the sentence.

but as de-
scribed in the
charge, must
be cognisable
by some.

404. As a general rule² it is desirable to follow the wording of the article, but it is not necessary that a charge should be couched in the terms of any appropriate article of war, unless it be desired to induce the special punishment declared by such article. It is, however, necessary that the crime, as laid, should be clearly cognizable under some or other of the articles of war, provision of the mutiny act, or other statute referring to the jurisdiction of courts martial; and no court martial ought to proceed to trial until they

(9) It was pointed out by a late judge advocate general that drunkenness, simple desertion or absence without leave, &c., ought not to be charged as joint offences.

(1) For the course to be pursued by

a prisoner, desirous of the evidence of a prisoner implicated in the same charge with himself, see § 918-9.

(2) See (§ 387) an exception as to "absence without leave."

have satisfied themselves of their competence to entertain the charge.

405. It has just been remarked, that it is not necessary a charge should be couched in the terms of any particular article of war, unless it be desired to induce the special punishment declared by such article; when however this is the case, it is irregular not to follow the article, and it is indispensably necessary that the charge should set forth in some shape or another not merely the acts done or omitted to be done, but also every fact and circumstance, which it is necessary to prove, in order to convict of the offence.

Article or clause must be followed, to induce a special punishment.

406. This principle may perhaps be best illustrated by cases which have actually arisen under the article³ which authorizes the punishment of death for the offence of offering "violence against a superior officer being in the execution of his office." In 1809 a soldier named Riley of Captain Thomas Power's company, of the 5th royal veteran battalion, was arraigned "For having on the 6th of January, at the island of Alderney, threatened to take away the life of the said Captain Thomas Power, and for attempting to do so with a drawn bayonet which he held in his hand; of which charge the court found the prisoner guilty, and sentenced him to death. The sentence was revised in consequence of a communication from the judge advocate general, (Mr. Ryder,) who thus expressed himself: "It appears to me that in applying the punishment of death, the court misapprehended the charge against the prisoner, which, as it does not contain any allegation that Captain Power was *in the execution of his office* at the time the prisoner made the attack upon him, does not come within the fifth article of the second section of the articles of war, and is not of a capital nature."⁴ It will be observed that this most material circumstance does not appear in any shape whatever in the charge upon which the above opinion was given; but where it can be collected from the charge itself, that the superior officer was in the execution of his office, the wording of the charge, though irregular, would seem to be sufficient in law. An award of the special punishment under the article was sustained, no longer ago than 1845,

Case of offering violence to superior,

where the special punishment could not legally be awarded;

where punishment was awarded upon an irregularly worded charge.

(3) Now the 41st Article of War.

(4) G. O. 12th May, 1809.

Article or clause must be followed, to induce a special punishment.

notwithstanding the absence of any formal averment, and after the attention of the highest legal authorities had been pointedly directed to the case. The circumstances were very peculiar: A private soldier had been sentenced by a general court martial held at Dublin, to be transported for a term of fourteen years, upon a charge of having "offered violence to" a corporal "his superior officer". The charge set forth details of circumstances of aggravation, fully accounting for the sentence awarded, but did not contain any *express* allegation that the corporal was in the execution of his office; this sentence was confirmed by the Queen, and Her Majesty's pleasure was notified in the ordinary course to one of the Irish judges, who at first objected to take the necessary steps for the transportation of the prisoner. The attorney and solicitor general in England being consulted were of opinion that the charge was sufficient, because they considered that it set forth *facts from which it might be collected* that the corporal was in the execution of his office at the time the violence was offered against him. The case was then brought before the judges in Ireland, and it is believed that they were unanimous in taking this view of it: — at all events, the judge, who had raised the objection, made the requisite order, and the offender was transported accordingly.

In cases of desertion:

of disgraceful conduct:

Article must be followed to induce a special punishment for habitual drunkenness: or offence depending on the intention.

407. So likewise, a soldier guilty of desertion could not be subjected to any of the punishments *peculiar* to that offence, if charged with absenting himself without leave. Neither could a district court martial award the penalties attached to "disgraceful conduct," even though the facts, brought in evidence at the trial, show that the imputation *might have been* correctly laid, except in the one case of embezzlement specially provided for in the eighty-fourth article of war,—unless the acts, specified in the charge, came within the description of the articles of war, and unless they were charged as disgraceful conduct.

The same principle applies to the offence of "habitual drunkenness:" though it appear in evidence that the prisoner had been drunk such a number of times as might establish this charge, yet if not imputed in *the crime*, he could not be visited by the punishment peculiar to it. Where *intention* enters into the offence, as described in

the articles of war, mutiny act, &c., it is as necessary to state the intention in the charge as any other of the facts and circumstances which constitute the offence: and it is always better to use the very expressions adopted by the law to indicate the intention; as "treacherously," "intentionally," "wilfully," "knowingly," &c.

408. Did not experience point to the necessity of these remarks, they might have been spared, as they may be reduced to the concise axiom: A court cannot go beyond the particular offence charged: A man tried for one crime cannot be found guilty, or receive judgment on another. Although military charges are not necessarily framed with the precision which is essential to an indictment, yet, in this particular, — that is where special and extraordinary punishments such as are not generally applicable to military offences, are in question, — the practice of courts martial comes very near that of civil courts of justice; "an indictment grounded upon an offence, made by act of parliament, must, by express words, bring the offence within the *substantial* description made in the act of parliament; and those circumstances, mentioned in the statute to make up the offence, shall not be supplied by the general conclusion against the form of the statute."¹ As courts martial professedly discard mere technical formalities, it is, as before observed, the more necessary to distinguish where form is essential to justice, and in this view, if in the practice of courts martial the spirit of the forms of civil courts of judicature can, in any case, be laid hold of without entailing the necessity of adherence to the subtle distinctions made by lawyers, a great point will be gained: and it must be under this restriction that precedents in the practice of civil courts of justice may be sought for, or admitted.

Charges must include all circumstances necessary to constitute the offence.

409. There are two offences depending on imputation, on which it may be necessary in this place to offer a few remarks, though they will be recurred to in the course of that which follows: *scandalous conduct* in an officer, and *disgraceful conduct* in a soldier. Many of the observations, which will be offered, would in a great degree apply on a charge of mutiny, or contempt, or disrespect, to a superior officer; as, in all these cases, the offence depending on the

Charges depending on imputation:

(1) 2 Hale, 170.

imputation which may attach to facts, it is necessary that the facts should be specially set forth in the charge.

Words, the subject of charge, must be specified.

410. When the charge is for disobedience of any "command," the command itself should be set forth, and the same principle applies when charges refer to threatening, disrespectful, or other insubordinate language. It has been laid down that,³ "When words are the subject of a charge, they should be set out at length, and after them (to save unimportant variances,) 'or words to that effect,' nor should it make any exception to this rule, that they were ever so unseemly, abusive or insulting."

Scandalous, infamous conduct:

facts to be stated,

411. The articles of war formerly enjoined, that in every charge preferred against an officer, for behaving in a scandalous manner, such as is unbecoming the character of an officer and a gentleman, the fact or facts whereon the same is grounded should be clearly specified.³ This provision was very highly lauded by most writers on martial law. Mr. Tytler terms it "a wise and equitable clause;"⁴ it has, however, been omitted; but it is conceived that its omission ought not to induce a neglect of the principle, as abstract justice requires that the accused should be apprized of the matter intended to be brought against him: this truth is so evident, as probably to be the very reason which led to the alteration in the wording of the article. The sentiments of His late Majesty George III. on the subject are very fully developed, in an order upon the trial of ensign James Imlach, of the 3rd West Indian regiment, upon a charge of "*ungentlemanlike conduct*." The prisoner was found guilty of *behaving in an ungentlemanlike manner*, declared by the court to be a breach of the twenty-second article of the sixteenth section of the articles of war,⁵ and sentenced to be dismissed from His Majesty's service. The order issued on this occasion proceeds thus: "His Majesty has commanded me, to point out the *irregularity* of bringing before a court martial, and putting an officer upon his trial, for a vague charge of *ungentlemanlike conduct*, unaccompanied with a

necessity of, enforced by a general order

vagueness in charge condemned.

(2) Judge Advocate General, 3rd April, 1851.

(3) Old Art. War, sec. xvi. art. xxx.

(4) Tytler, 213.

(5) Subsequently art. xxx., sec.

xvi., and now Art. War, 83. The word "infamous" was omitted in the year 1857. The accumulation of epithets was hardly in the spirit of Art. 165, forbidding the use of reproachful words to prisoners.

designation of the offence, to which that predicament is meant to be applied. And I am further commanded to express His Majesty's surprise, that the court martial should have pursued the like irregular course, finding the defendant guilty *generally* of ungentlemanlike behaviour, and declaring his crime to be in contempt of a special article of war, which has for its object the removal from the service of officers who are convicted of scandalous and *infamous* behaviour, and thereby affixing a most serious imputation upon the prisoner's character, without attending to an express provision contained in the same article of war, which enjoins, that in every charge against an officer for scandalous and unbecoming behaviour, the facts or fact wherein the same is grounded shall be clearly specified."

412. It appears to be equally necessary, that the facts by which the imputation is to be supported, should be stated on a charge against a non-commissioned officer or soldier, for "disgraceful conduct." Exact analogy exists between the offence of *scandalous* conduct in an officer, and *disgraceful* conduct in a soldier; the reasoning which applies in one case, must in the other; and the orders which have, from time to time, appeared respecting the charge for one offence, may appropriately be referred to when considering a charge for the other.

Disgraceful conduct, analogous to scandalous, infamous conduct;

413. In support of the assumption, that facts must be set forth, by which to maintain a charge of disgraceful conduct, the following case may be mentioned; Private James Macnamara, 81st regiment, was tried in March, 1830, before a garrison court martial, "for disgraceful conduct, he having been repeatedly guilty of offences by which he is deemed unworthy to remain in His Majesty's service:" to which charge the prisoner pleaded "not guilty, I do not know what crime I am tried for;" the court, however, found him guilty, and without sentencing him to any punishment it was competent to award *recommended* him to be "discharged with ignominy as unfit for His Majesty's service from vice and misconduct." The proceedings were submitted in the ordinary course to Major General Ross, lieutenant-governor of Gurnsey, for approval. He conceived that the want of specification in the charge was an error of such importance as to render nugatory the sentence of the court, and caused the proceed-

facts to be stated;

facts to be
stated;

otherwise
charge not
supportable.

Charges may
be altered
before arraignment
of prisoners.

A charge cannot
be altered
after arraignment

except to correct
name or
description.

ADDITIONAL
CHARGES.

Additional
charge cannot
be entertained
subsequent to
arraignment,

nor additional
instance,

ings to be transmitted, with his remarks, to the judge advocate general, who entirely concurred with his excellency in thinking the charge so absolutely defective in all legal respects, that it was impossible to confirm a finding of guilt thereupon; and added, that he considered any revision of the sentence out of the question, as no sentence of punishment could be *properly adjudged* or enforced upon a charge not supportable in law.⁵

414. Though the form and wording of the charge is, in the first place, left to the officer preferring it, yet the officer ordering the court martial may alter or amend it, at any time, *antecedent to arraignment*; except, that where the charges are embodied in the warrant for holding the court martial, which sometimes happens when it issues under the sign manual, they cannot be altered after the warrant is signed. The warrant may however be revoked previous to arraignment, and a fresh one issued with amended charges. It is a part of the duty of an officiating judge advocate, to represent to the officer convening the court martial any error or omission in the charge, and thereby to anticipate or obviate any delay on the assembling of the court. The prisoner once arraigned, it is not the custom of courts martial to permit any alteration in the charge, either by the actual prosecutor or judge advocate, except as it may arise out of an objection on the part of the prisoner, analogous to a plea in abatement for a misnomer or wrong addition.⁶

415. It is competent to the superior authority, not only to revise and alter the original charges after a copy has been furnished to the prisoner, or after the court has been assembled for his trial, but also to prefer additional charges, and, at any moment previous to the court being sworn, to require it to investigate them, the prisoner necessarily having due notice of the alterations or additional charges, before being called on to answer to them. But a court martial cannot entertain any additional charge, brought forward *subsequently* to the swearing of the court and the arraignment of the prisoner, either referring to the charges in issue or to a distinct offence. This rule is not only established by the custom of courts martial, but must result from the terms of the oath administered to each

(5) See § 409-13.

(6) See § 389.

member: "You shall well and truly try and determine, according to the evidence, in the *matter now before you*." The prisoner is unquestionably amenable for any offence, *not being part* of the subject matter in issue, committed, either (if within the limited period),⁷ prior, or subsequent, to the date of arraignment; but such offence must form the subject of a separate charge, and the trial be distinct. A court, if ordered to try the further charge, must pass judgment on the charges to which the prisoner has pleaded, and then, being resworn, proceed, without reference to the former trial, as in ordinary cases.

but may be
proceeded
with on a new
trial.

416. On general courts martial it is customary for the officiating judge advocate, either himself to furnish the accused with a copy of the charge to be preferred against him, or to ascertain that it has been transmitted. In case of trial by inferior courts, this duty devolves on the adjutant. To a soldier who cannot read, the charge is read, and, if necessary, explained by the person who warns him; in some instances this may be the officer or non-commissioned officer of the guard, or the provost marshal.

The prisoner
is furnished
with a copy
of the charges,

417. This form, so essential to justice, should be complied with as early as possible; at all events, some time before the trial: it is usual to do so as soon as the superior authority has approved of the charges, or immediately after the commanding officer has decided on bringing the offender before a regimental court martial.

some time
before trial;

418. Though the prisoner cannot plead a deviation from this custom, or any variance between the copy given him and that exhibited before the court, as a bar to trial; yet the court, under such circumstances, and particularly where the deviation may be material, would probably deem it a sufficient cause for delaying proceedings; as common sense and reason would dictate that the accused should have a knowledge of the accusations brought against him previous to trial, and adequate time afforded to enable him to meet the charges, by such evidence and reasoning as the case may require, and as he may deem expedient. A court of enquiry has recorded an opinion, "that the method of procedure" of the commanding officer of a regiment "was unduly precipitate," in having

and has notice
of trial, which

must not be too
precipitate;

(7) See § 52.

brought a soldier to trial only an hour and a half after he had received notice of it.⁸ His Majesty was pleased to signify his entire concurrence in the observations and opinions contained in this report. It may, however, be remarked, that, in the case referred to, the necessity of immediate example did not appear to exist, the soldier having been twenty-four hours in the guard-room, subsequent to the occurrence of the offence, and previous to the determination of the commanding officer to bring him to trial. The provision in the hundred and thirty-seventh article of war, for the trial, by regimental courts martial, of soldiers charged with mutiny or gross insubordination on the line of march, and for carrying the sentence into execution on the spot, affords ample proof that extreme cases may justify a deviation from the otherwise well-established custom of giving a prisoner notice of his intended trial and of the charges to be referred against him, previous to arraignment.

but extreme cases justify a deviation from this custom.

If former convictions, notice is enjoined,

and proof of is required;

abstract of convictions sometimes furnished.

List of the witnesses.

419. Previous notice of an intention to bring forward former convictions is required to be given the prisoner, as otherwise the court could not receive evidence on this point:⁹ This notice is usually given by the adjutant or other officer who is intended to produce the evidence of previous convictions, but any other evidence has been considered sufficient, if the court has deemed it conclusive as to the fact; as, for instance, that of a corporal who was present when the notice was given. It is the practice in some regiments, although perhaps not the general custom, to furnish the prisoner with an abstract of the convictions, which are to be brought against him.

420. Sir Charles Morgan laid down the rule that it was not the duty of a judge advocate, *in all cases* to furnish a prisoner, previous to the trial, with the names and designation of the witnesses, by whose testimony any act objected against him is expected to be proved; and, on the other hand, that it was not requisite for the prisoner to furnish the judge advocate with the names of any other witnesses than those whom he wishes to be officially summoned. He thought such communication might possibly, in some instances, lead to inconvenience on either side.

(8) G. O. No. 508. Court of en- ville, 2nd or North British Dragoon.
quiry on private Alexander Somers-

(9) Art. War, 155.

421. Unless there were some sufficient reason to justify its being withheld, it would not be in accordance with the existing practice of the service to refuse the prisoner a list of the witnesses for the prosecution: the almost universal custom is to give it as a matter of course.

List of the witnesses.
Existing practice of the service respecting.

422. In the case of a soldier, a list of the witnesses for the prosecution is usually added to the copy of the charge which is furnished to him when he receives notice of trial, at which time he is also asked what witnesses for the defence he wishes to be warned to attend the court martial.

In case of a soldier.

423. The prisoner has in no case the *right* to demand a list of the prosecutor's witnesses; and on a reference to the judge advocate general's office, an officiating judge advocate was strongly advised not to furnish the prosecutor with a list of witnesses for the defence, a request to that effect being unusual.

Neither party has a right to demand; nor

is it usual for the prosecutor to request.

424. As the prisoner's witnesses, if duly summoned, must be known to the judge advocate, it follows, that to place the parties on a footing, affording to each equal opportunities of questioning and supporting objections to the competency and credibility of witnesses, a list of the witnesses to support the prosecution should on no account be withheld from the prisoner when the judge advocate has been consulted respecting it. It is true that the prisoner need not, previous to the assembling of the court, make known to the judge advocate the names and designation of his witnesses, but his failing to do so must be attended by the incalculable inconvenience arising from his witnesses not being duly summoned; their attendance, in such case, depending entirely on caprice or inclination, and no penalty attaching to their absence.

Should be furnished to prisoner

when necessarily known to prosecutor.

425. On the assembling of the court, a list of witnesses on the part of the prosecution is ordinarily laid on the table. It is not, however, enjoined, nor will a deviation from this practice prevent the production of any witnesses whose names are not included in the list.¹

usually laid on the table, on assembling.

426. Except when general courts martial are convened

(1) In criminal proceedings it is the practice to place the names of all witnesses for the prosecution on the back of the indictment, but it does not prevent the prosecution from calling

other witnesses; indeed it is necessary to put the names of such witnesses only on the back of the indictment, as may be sufficient for the grand jury to find the bill.

Order directing the assembling of the court,

by special warrant, both general and district or garrison courts are assembled by the order of the officer duly authorized in that behalf, some time, and, except in case of emergency, not less than on the day preceding the assembly of the court. This order in the usual routine specifies the description of court, the purpose of its assembly,² and the name of the president;³ and, either, fixes the date and place of meeting, and details the number and rank of officers for this duty according to the general roster,⁴ or otherwise leaves these details to be arranged by the officer in whose command the court may be directed to assemble. The order generally directs that a return of the names and dates of commissions of the members be forwarded to the adjutant-general, or other staff officer, for the information of the judge advocate or president; and also, at the discretion of the convening authority, details one or more "officers in waiting" to provide for casualties or for the case of challenges being allowed. Detachment or regimental orders are in like manner issued for the assembly of detachment and regimental courts martial, and in this last case all the officers to form the court are mentioned by name, equally with the president.

regimental courts martial.

Detail of court,

427-9. Mr. Tytler has assumed that it is necessary to furnish the prisoner with a correct detail of the members of the court martial; but except in so far as this information may be conveyed by the orders for the assembly of the court, the custom of the service is decidedly opposed to this dictum, though abstractedly there may be much reason and

not usually furnished to the prisoner;

(2) By G. O. dated Simla, 23rd June, 1838, His Excellency the Commander in Chief (Sir H. Fane), considering the practice which occasionally prevailed of mentioning in the order convening the court, the name of the individual to be arraigned, to be objectionable, is pleased to direct its discontinuance, and to direct that in future the order forming the court be framed generally for the trial of such prisoners as may be brought before it.—*Asiatic Journal*, vol. xxvii. p. 304.

(3) Where a court martial was assembled at a distant out-station and the president was to be furnished by that or another out-station, it had become usual, with the view of prevent-

ing the delay and inconvenience arising from an officer, appointed by name, being unable from illness or otherwise to perform the duty, to appoint the president in some such form as the following—"President—A field officer (or as the case may be) who will be named by the officer commanding the troops at——," thus leaving it open to name himself or any other officer; and this practice has now been expressly authorized by the alteration in the hundred and eighteenth article, introduced in 1860, which provides that the president of every court martial shall be appointed by the officer convening the court or 'under his authority.'

(4) See § 21.

justice in it; for, peremptory challenges not being allowed in military courts, every facility should be afforded the prisoner, to enable him to be prepared to show cause, in the event of objecting to any officer detailed as member. The order for a district or general court martial seldom details more than the name of the president, or of any other officers above the rank of captain, and, for the rest, merely detailing the number and rank to be furnished by different districts, brigades, corps, or garrisons. The regimental order specifies the names of the officers for this duty, and to this, a prisoner, in his own regiment, may have access without any difficulty; the names and dates of commission of all the members are forwarded to the judge advocate of a general court martial, and, when in his power, he would seldom be disposed to refuse the prisoner a copy, on his making a proper application to that effect: but in the every day practice of the service, the names are often not sent in sufficiently early to admit of any fixed rule of this sort.

Detail of court.

how put
in orders.

CHAPTER XII.

OF THE COURT AND ITS POWERS, THE PARTIES TO THE TRIAL, AND THE PROCEEDINGS.

The president responsible for the decorum necessary to a court of justice.

430. AT courts martial the president is charged with the maintenance of proper order, and, not so much from his individual rank, as in virtue of presiding over a court of justice, and thereby exercising the power vested in it, is called on to repress impropriety of conduct or language on the part of every person present at its proceedings.

The president acts as judge advocate at general detachment and minor courts martial.

431. At courts martial, other than general, the president acts in the place of judge advocate as to administering oaths, advising the court when necessary, transmitting proceedings, and summoning witnesses, when required thereto by the prosecutor or prisoner, but not in all respects; as he can neither interfere with the charge, nor with questions of evidence *out of court*, nor give an opinion, except in his judicial capacity, as to the wording and propriety of the one, or the arrangement and sufficiency of the other; such interference would be quite incompatible with the office of judge, and is forbidden by the most obvious dictates of justice.

Decent behaviour of members.

432. The articles of war enjoin the members to behave with decency; and in the case of their using intemperate words, require the president to direct the same to be taken down in writing and reported to the officer ordering the court martial to assemble.¹

433. No reproachful words are to be used to witnesses or prisoner, and the president is responsible that every person attending the court is treated with proper respect.¹

CONTEMPTS.

434. The hundred and sixty-fourth article of war empowers courts martial at their discretion, to punish an officer or soldier for menacing words, signs or gestures made use of

(1) Art. War, 165.

in their presence, or for disorder or riot amounting to a disturbance of their proceedings. It must however be remarked that no contempts are thus subjected to a *summary* punishment except such only as are of an aggravated and *self-evident* nature, which being committed in the *presence* of the court, do not need to be substantiated by any other evidence, and not being dependent on any constructive interpretation of the law, do not require more protracted investigation. Courts martial have acted on this power;²—and there are cases on record, where they have done so, even without giving the offender an opportunity of offering any excuse in mitigation, which, to say the least, are not precedents that can be recommended—or they have accepted an apology where the contrition of an offender justified this course, and their authority was sufficiently vindicated by his voluntary submission: at other times, charges have been preferred by the court or by direction of the confirming or other superior authority, whose notice had been drawn to the circumstances either by a special report, or by their appearing in the record of the proceedings. The court

Treatment of witnesses and prisoner, by persons amenable to military law;

contempts, when direct, may be summarily disposed of by courts martial:

how noticed,

and under what limitation.

(2) The following order, quoted from Hough on Courts Martial (1825), p. 455, explains a case, where a court martial awarded a summary punishment on the prosecutor in the trial before it.

"G. O. by Colonel McKensie.

20th July, 1791.

"Remarks by a General Court Martial.

"The Court determined that the paper read in open court by Mr. P. (the prosecutor) is an insult of the grossest kind on the proceedings of this court, replete with misrepresentation, and a reflection on the dignity of courts martial, and that, after the repeated reprimands Mr. P. has already received from the court, and experiencing their lenity to so great a degree as he has done, by several instances of his conduct being hitherto overlooked; they find themselves under the indispensable necessity of ordering him into arrest for his contemptuous, disrespectful conduct. The court are further of opinion, that Mr. P.'s delivering into the court the written paper, which he called a *protest*, saying he had nothing now to offer in

reply, and retiring immediately, instead of making his reply as was expected, and for which leave was granted by the court, at his own request, is a serious aggravation of the offence that preceded it, and is a *menace*, which seems intended by him to bias their judgment in passing sentence on Mr. M. Taking those matters, together with the intemperate and contemptuous conduct of Mr. P. throughout the whole of this trial, into their most serious and solemn contemplation; and feeling the necessity of discouraging, in the most exemplary manner, all sorts of *intemperance* and *contempt* towards the only tribunal that exists for the preservation of discipline in the army (general courts martial), they pronounce Mr. P. surgeon of the 5th European battalion, guilty of a breach of the 13th Art., Sec. xii. of the Arts. of War," (similar to Art. 164 of the present day,) "and they sentence him, and he is hereby sentenced to be suspended from his rank, pay, and allowances in the honourable company's service, for the term of six months."

can take cognizance only of what occurs in their presence, as their oath to try and determine according to the evidence, does not include the new matter of the contempt; but the oath to administer justice is general, and in these cases, the members of the court act upon it, as judges.³ It may be observed that the court, in the case of all persons, not already before it as parties to the trial, decides without their having had an opportunity of challenging the officers composing it. These exceptions to the general rule arise from the nature of the case. The words of the article ("the said court") are express, and the custom of the service is an authority, for the summary award of punishment by the court (that is, the same and not exposed to any change by the allowance of challenges) whose proceedings may be interrupted.

Amount of
punishment
not laid down.

Grave offences
cannot be
summarily
punished.

Minor courts
martial
have not
discretionary
power as to
officers, but

may impose
an arrest.

435. The restrictions under which a court martial is to exercise its discretion, in the case of a military offender, are no where pointed out; but it is very certain that no sentence in respect to the offences declared in the article of war, can exceed that which the court is competent to award for a crime not capital; nor has a court martial the power to proceed to a summary sentence, in respect to any other offences, merely because they may have been committed in its presence, although instances are not wanting where officers have been led into illegalities under some such impression.⁴ Minor courts martial also may punish summarily, for menacing signs, words, gestures, disturbances, or riots, by soldiers; but, from their constitution, are not competent to award any punishment to commissioned officers. A regimental or other court martial, however, under such circumstances, may impose an arrest on any officer of whatever rank, though each individual member may be his junior.⁵

436. In the case of civilians, the correct course is more

(3) See § 442, and also an extract from Blackstone's Commentaries, § 436.

(4) In the year 1849, a soldier who was being tried before a general court martial in the West Indies, struck his superior officer in the execution of his duty, in the presence of the court: the court did not proceed with the trial of the charge on which he had been arraigned, but sentenced him to trans-

portation for life.

The general officer was informed that this sentence for an offence of which he had been neither arraigned nor tried, was altogether illegal, and Her Majesty, by reason of such illegality, was pleased to extend her gracious pardon to the prisoner.

(5) Court martial on Major Brown. Samuel, 635.

distinctly laid down. A court martial is not required by the articles of war to award summary punishment, nor has it the power of ordering into arrest. It may however, if necessary, direct the removal by force of any person who may obstruct its proceedings, or require the assistance of a peace officer, in order to his being "taken before the civil magistrate to be punished according to law."⁶ The latter part of the hundred and sixty-fourth article of war, distinguishing between the officer or soldier and the civilian, was added in 1847, and must be taken to have pointed the only way in which it is now competent to a court martial to exercise its power to protect itself from interruption on the part of persons not of the military profession: the uncertainty which previously existed on this point must have arisen from the infrequency of the offence, and from the want of reflecting on the power to preserve order and decorum in their proper place of assembly, which is inherent in all courts of justice legally constituted, because virtually conceded when the law created them. Sir William Blackstone observes: "Laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it exercised as early as the annals of our law extend."⁷ He elsewhere writes: "Not only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a misprision, and have been punished with large fines, imprisonment, and corporal punishment. And even in the *inferior* courts of the king, an affray or contemptuous behaviour is punishable with a fine, by the judges there sitting; as by the steward in a court-leet, or the like."⁸

Power of courts martial in respect to civilians guilty of contempts.

All courts of justice have power to repress direct contempts.

437. All witnesses attending courts martial, who shall refuse to be sworn, or being sworn shall refuse to give evidence or to answer all such questions as the court may legally demand of them, are liable, upon complaint made, to

Witnesses refusing to be sworn, or to answer a legal question,

(6) Art. War, 164.

(7) 4 Commentaries, 285.

(8) *Ib.* 125.

may be
attached;

attachment in the court of Queen's Bench in London or Dublin, or the courts of law elsewhere in Her Majesty's dominions, as laid down by the statute.⁹ In these cases courts of record immediately imprison for a contempt of court; but, where courts martial cannot enforce the attendance of witnesses, being civilians, except by attachment in the superior courts, it would not be advisable to proceed in a summary manner. If it were apprehended that the ends of justice were likely to be defeated in any particular case, by the obstinacy or perverseness of a witness, perhaps the best course would be to adjourn the proceedings and to lay a statement of the facts and circumstances of difficulty before competent authority for consideration and advice. An officer or soldier may be ordered into arrest or confinement, when charges may be preferred against him for the contempt, as a breach of good order and military discipline.

or military
witnesses may
be brought to
trial by a
court martial.

Witnesses are
not obliged to
answer all
questions.

438. It may be observed that the liability of a witness to punishment, for refusing to answer, does not simply arise from the disrespect which may be imagined to be involved in his declining to be guided by the opinion of the court, though doubtless if the question prove rightly admitted, and such as they may *legally*¹ demand, (and on this would turn the decision in all cases,) such pertinacity would then constitute the essence of the contempt for which punishment would be awarded.

Perjury or
prevarication,
how cogni-
zable by a
court martial.

439. A court martial may either order a witness at their bar, who may be subject to *martial* law and be guilty of perjury or prevarication, into arrest, and prefer charges for the offence; or such conduct may be notified in the proceedings, after judgment is recorded, for the information of the authority convening the court martial.²

Power to
administer
an oath

440. A court martial is not duly formed and cannot proceed to the hearing of the matter for which it may be assembled until the president and other members have taken the oaths prescribed in the articles of war:³ the first of these

(9) Mut. Act, sec. 13.

(1) The privilege of witnesses in not answering will be again adverted to under that head (§ 961).

(2) See further, § 127.

(3) "You shall well and truly try and determine according to the evi-

dence in the matter now before you. So help you God."

"You shall duly administer justice, according to the rules and articles for the better government of Her Majesty's forces, and according to an act now in force for the punishment of mutiny

which they take in their capacity as jurors, binds them to try and determine according to the evidence; the other refers to their duties as judges and also includes an oath of secrecy as to the sentence of the court until approved, and as to the vote and opinion of the particular members. The judge advocate at general courts martial is also required to take an oath of secrecy,⁴ which, until 1847, did not extend to the sentence of the court, and still allows him to disclose it when necessary in the discharge of his duties.

to the
members,

and judge
advocate,

441. The court, although it may be formed of the same officers, must be re-sworn at the commencement of each trial before any proceedings be had thereon.⁵

which must
be repeated
on each trial.

442. Until the revolution of 1688, the articles of war required that members of all courts martial should perform "the duty of judges"⁶ under the sanction of an oath; but after it the mutiny acts prescribed only the juror's oath,—the same as that still used, but with the addition of the words, "between our sovereign lord and lady, the King and Queen's Majesties and the prisoner to be tried"—to be administered at general courts martial, when the offence tried was punishable by death, and then either by a justice of the peace, the judge advocate or his deputy. This oath, as well as that to administer justice, is now required to be taken on all occasions without exception, and it will be observed that the form, as now modified, applies not only to

During an
interval of
many years,
courts martial
were not
uniformly
sworn.

A gradual
return to
the system
of swearing all
courts martial.

The oath at
first prescribed
by the mutiny
act,

has been
modified,

and desertion, and other crimes therein mentioned, without partiality, favour, or affection, and if any doubt shall arise which is not explained by the said articles or act, according to your conscience, the best of your understanding, and the custom of war in like cases:—And you shall not divulge the sentence of the court until it shall be duly approved;—neither shall you, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof as a witness by a court of justice or a court martial in due course of law. So help you God."—Art. War, 154.

(4) "I, A. B., do swear, that I will not, upon any account whatsoever, disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evi-

dence thereof as a witness by a court of justice or a court martial in a due course of law; and that I will not, unless it be necessary for the due discharge of any official duties, disclose the sentence of the court until it shall be duly approved. So help me God."—Art. War, 154.

(5) Art. War, 154. Queen's Reg. p. 221.

(6) "Article XLVIII. Such who are judges in a general court martial or regimental court martial . . . shall take an oath for the due administration of justice according to these articles or (where these articles do not assign a special punishment) according to their consciences, the best of their understandings and the custom of war in like cases."—Rules and Articles (by King James the Second), 1688.

and applied to any matter, which can be brought before a court martial.

The oath of secrecy has also been modified.

All courts martial have authority to receive evidence on oath,

or solemn affirmation;

but an oath may be dispensed with,

not only in certain cases of conscientious scruple,

but also under the provisions of a general statute,

which permits all persons refusing from conscientious motives to be sworn in criminal proceedings, to make a solemn affirmation or declaration.

the trial of prisoners, but also to the trial of an appeal or the hearing of any dispute which may be brought before a regimental or other court martial. No oath was required to be taken by members of regimental courts martial, nor by witnesses before them, prior to the year 1805, although the subject had been brought to the consideration of parliament in 1753, by the Earl of Egmont, who then proposed a clause to that effect. The oath of secrecy at first required from members of general courts martial was without limitation; the exception, "unless required to give evidence thereof, as a witness by a court of justice, in a due course of law," was afterwards introduced;¹ and the oath of secrecy, as it now stands, was not enjoined for regimental courts martial until 1829.

443. All courts martial have power and authority, and are *required* by the mutiny act,² to administer an oath to every witness or other person who may be examined in any matter relating to any proceeding before them other than to those who are by law empowered to make a solemn affirmation: but this requirement does not apply to the case of any persons, who may be examined before the court is itself sworn.

444. Courts martial, for many years, have been empowered, under the provisions of special acts of parliament, to receive the affirmations of Quakers, Moravians, and certain other persons who entertain a conscientious objection to an oath;³ and also, in India, in the case of the high caste brahmins and other natives, who hold the usual form of oath to be forbidden by their religion.⁴ This relief has been extended by an act which was passed at the close of the last session of parliament and enacts that: "If any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required or desiring to make an affidavit or deposition in the course of any criminal proceeding, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions,

(1) "Or a court martial" has been since added.

(2) Mut. Act, sec. 14. Art. War, 155.

(3) 3 & 4 Will. 4, cc. 49 and 82. 1 & 2 Vict. c. 77.

(4) 9 Geo. 4, c. 74, s. 37.

upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration, in the words following: *videlicet*,

Solemn affirmation.

‘I, A.B., do solemnly, sincerely, and truly affirm and declare, That the taking of any oath is according to my religious belief unlawful; and I do also solemnly, sincerely, and truly affirm and declare,’ &c. Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.”⁵ In every case the statutes provide that the persons thus relieved, who shall make a false affirmation or declaration, shall incur the penalties of wilful and corrupt perjury.

445. An oath is an outward pledge given by the person who takes it, that his attestation or promise is made under an immediate sense of his responsibility to a Divine Being: who, according to *his* belief, enjoins truth and punishes falsehood. This notion of the Deity is *essential* to the nature of an oath, in that sense in which alone it can be administered as legally binding in *any* court of justice, where the necessity of this sanction is imperative by act of parliament: the form *may*, and more generally does, either virtually or directly, call down the vengeance or renounce the blessing of the Intelligence, who may be appealed to, as the just and undoubted penalty of false swearing.⁶

Definition of an oath.

as it may be received by a court martial.

446. The forms of oath for the president and members of courts martial, and for the officiating judge advocate, are prescribed by the articles of war (§ 440), as also the order in which they shall be administered (§ 520).

The form of oath prescribed, for court,

447. The hundred and fifty-fifth article of war directs that all persons who give evidence before any court martial other than those who are by law empowered to make a

for witnesses.

(5) 24 & 25 Vict. c. 66, s. 1. It is presumed, in the absence of authoritative information, that courts martial may avail themselves of a further relaxation of the law of England, under the conditions imposed by the colonial acts, in those colonies where, by virtue of the act, 6 Vict. c. 22, the colonial legislatures have made laws or ordinances for the admission of the unsworn testimony, “IN ANY COURT” of “tribes of barbarous and uncivilized

“people, who, being destitute of the knowledge of God and of any religious belief, are incapable of giving evidence on oath in any court of justice.”

(6) The energy of the usual form turns on the particle *so*,—upon condition of speaking the truth, may God help me, and not otherwise: “So help me God,” or some equivalent expression, may be found in the oaths of most countries, and in the earliest times.

for witnesses,

solemn affirmation, (§ 444) are to be examined upon oath, in the following words: "The evidence which you shall give before this court shall be the truth, the whole truth, and nothing but the truth. So help you God."¹ This form is therefore, without deviation, to be observed in the examination of military witnesses, with reference to whom the article is imperative:² but with respect to persons who may be summoned, to give testimony, and who may not be controllable by the articles of war, the form must be varied to meet their view of what may be more proper.

may be deviated from, when other form more binding.

A peer of parliament must be sworn.

448. Peers are sworn as other witnesses; nor does their privilege of giving judgment on honour, and *not* on oath, apply when assisting as members of a court martial.

The ceremony accompanying an oath is not prescribed,

449. It is obviously most conducive to truth to swear all witnesses according to the particular form which they may deem most solemn, and with whatever ceremonies may be likely, from previous associations, to create the greatest impression, and so promote the object of the law in requiring a *religious* sanction. On this principle the corporal or *bodily* oath, (a term used, as contradistinguished from an oath taken by word of mouth only, unaccompanied by any external ceremony, and as opposed to a written instrument solemnly calling on God to witness to its truth), not being the essence of the oath, is held to be mere matter of form. The words are prescribed for military witnesses, as before remarked, but the outward³ act is still left in all cases to custom. On ordinary occasions, the witness kisses the bible or the new testament, as containing the gospels: with a roman catholic, the same ceremony is observed except that the book is closed and a cross delineated on the cover. If the oath be taken on the common prayer-book which hath the epistles and gospels, it is good enough, and perjury upon the statute

not being in any case essential.

Form observed on ordinary occasions.

Roman Catholics.
Exceptions; on the book of Common Prayer,

(1) Art. War, 154. See § 444.

(2) It is probable that the article of war under consideration, first introduced in the year 1835, was not intended to effect more than to ensure uniformity in the form adopted, when not at variance with the religion a soldier may profess.

(3) The lifting up of the hand towards heaven, the ceremony observed in the courts of Scotland, France,

Holland, Germany, and Italy, by patriarchs of the Old Testament and heroes of profane antiquity; the casting the porcelain to the ground in China, kissing the Crucifix, or, in Spain, the form of a cross, made by placing the middle of the thumb on the middle of the fore finger, are each of them as much a corporal oath as kissing the book of the Evangelists in England.

may be assigned upon this oath.⁴ Mahometans are sworn on the koran, sometimes kissing it, or placing it on their head. Jews are sworn on the pentateuch.⁵ Sikhs on the grinth. Hindoos may be sworn by the vedas. On the occasion where the validity of a heathen's oath was first affirmed,⁶ the hindoo witnesses were sworn by touching a brahmin's foot; in the present day, their oath is usually sanctioned at Calcutta, by the witness taking in his hand holy water from the Ganges and leaves of a sacred plant, the *toolsee*, or sweet basil; but the form of hindoo oath varies in different parts of India, and according to the caste of the individual.

Mahometans,

Jews,
Sikhs,
Hindoos.Their oaths
very various.

450. It has been recommended to collect some account of the forms of oath most likely to be required by courts martial: the most brief compilation of this sort would far exceed the limits of this work, and, even if complete, would be more curious than practical, as the proper form is in most cases easily ascertained in each country when required: but it would be impossible to collect information which might be relied on in every case, and the attempt would most certainly⁷ fail, precisely where information might possibly have been useful.

It would not
appear necessary
to give
any more
precedents.

(4) 2 *Keble*, 314, *contra* by *Windham* of a psalm book only. In a late case, a witness professing Christianity objected to be sworn on the Evangelists, and was sworn on the Old Testament, on stating that he considered that to be binding on his conscience. — *Ryan and Moody*, N. P. C. 77. See § 451.

(5) Where a Jew had assumed a false name and been sworn as a Christian on the New Testament, and a new trial was applied for on this ground, it was refused, as by *taking* the oath he clearly subjected himself to all the *temporal* obligations. — 1 *Phillips*, 18.

(6) The often-quoted case of *Omychund v. Barker*, *Athys*, 21—51. "Certain of the witnesses, subjects of the great mogul, and professing the Gentoo religion, had been sworn at Calcutta, a factory within that country," in 1742, according to the most *solemn* form of their religion, and after the prescribed words had been recited to them: the admission of their evidence was objected to, not only upon technical grounds, but also on the broad

principle that it was improper for a Christian court to allow an oath sworn by *false* gods. After hearing the arguments of the leading men of that day, and taking very ample time for consideration, the lord chancellor (*Hardwicke*) overruled the objection.

(7) In 1835, on a general court martial at Fort Willshire, on the eastern frontier of the Cape, of which the editor was a member, it was necessary to obtain the evidence of several Caffres, who were allowed to take the oaths they were in the habit of using in trials amongst themselves. For these it would not have been so easy to find precedents in law books, *even if* there had been a library to refer to, although the multiplicity of oaths volunteered by the same witness, and even many of the particular forms adopted, afforded an additional instance of the similarity of customs in different countries and in remote ages. The common Caffres uniformly swore by the subordinate chief of their tribe; a petty chief, in addition to his immediate superior, swore by the *King of England*, which was remarked at the

The *most* solemn form of oath should be adopted, but a court martial *may* adopt any,

and false swearing is nevertheless punishable.

Oaths, by whom administered, to the court, to witnesses,

by a priest.

Jew.

Subterfuges of dishonest witnesses.

451. It should be the object of a court martial, in all cases, to adopt that form of *oath* which *most* forcibly imposes the obligation of speaking the truth; but they *may* adopt *any* form which is authorized by the custom of the country of the witness, or which he may declare to be binding on his conscience. The 1 & 2 Vic., c. 105, enacts that every person shall be bound by an oath, provided the same shall have been administered in such form and with such ceremonies as he may declare to be binding, and in case of wilful false swearing, shall be punished in the same manner as if it had been administered with the form most commonly adopted.

452. The persons by whom the oaths shall be administered to the court are specified in the articles of war (§ 520): witnesses are usually sworn by the judge advocate at general, and by the president at other, courts martial: but if the opinion or prejudice of a witness should render it expedient, the oath may (in open court) be administered by the priest of his religion, as is usual with natives of India. It may be observed that a jew, who wears his hat in the synagogue, should be made to wear it whilst being sworn: upon the same principle,⁸ soldiers, who remain covered in the presence of the court, invariably uncover whilst taking the oath. Jews regard no oath as obligatory unless their head is covered, nor is their folly, to borrow the language of a recent treatise,⁹ a single shade more degrading than the subterfuges by which too many of our own countrymen attempt to deceive both themselves and justice: it is notorious, for example, not only at the Old Bailey, (though that court has given the name to this particular species of fraud), but elsewhere, that many a witness, if he can but escape observation and kiss his thumb instead of the book, will pledge himself to any falsehood without apprehension of incurring the guilt of perjury; another shift resorted to by the dishonest is to say nothing, but when the oath is recited in the second person, to kiss the book, and so fancy they have escaped the responsibility. In parts of Wales, the oath is not considered binding unless three fingers

time as illustrating how readily the natives accommodated themselves to the new state of things consequent on the oath of allegiance to the crown, which they had taken on the cessation of hostilities a few weeks previously.

(8) The custom of taking off the right glove no doubt originated in the reverential feeling for the religious act, which is implied by the solemn appeal to God.

(9) Tyler on Oaths, 1836, p. 47.

are laid on the book ; in the metropolis when Irish roman catholics are sworn, the magistrates often require them to cross themselves in addition to kissing the book marked with the cross.

453. The decent solemnity which is customary at courts martial is very different from the unimpressive and irreverent manner of administering oaths too often observable in civil courts ; nor is this favourable contrast unnoticed by the learned author before referred to, by whom also it is most judiciously remarked, that as the manner in which the thing is done has often a far greater influence upon the generality of mankind than the real character of the thing itself, the mode of administering an oath becomes a subject of very great importance.

The manner in which an oath is administered, ought not to be considered unimportant.

454. All deliberation of the court takes place with closed doors : at other times, a court martial is open to the public, military or otherwise, except to those persons, who have been summoned as witnesses, (§ 471, 943) with such limitation as the capacity of the room or tent in which it is held, and the convenience of the court and parties before it, may dictate. The president orders the clearing of the court for deliberation, when he may deem it expedient ; or, for any incidental discussion, at the instance of a member or the judge advocate. It is competent to a court martial to forbid the publication of a report of the trial² during its continuance, and a breach of this order may be prosecuted as a contempt of court, in the Queen's superior courts.

All trials by courts martial take place in open court ;

but they deliberate in secret,

and may forbid the publication of its proceedings during the trial.

455. The parties before the court may claim the benefit of its aggregate opinion, on any disputed question of law or custom arising out of the proceedings, and in the decision of which the parties may be interested.

Parties may claim the opinion of court, in questions of law and custom.

456. The majority of votes decides all questions as to the admission or rejection of evidence, and on other points involving law or custom ; and in such cases, (but not as to the finding and sentence of the court,³) where the votes are equally divided, the custom of the service, and the necessity of the case, justifies the decision of the question on the side on which the president may vote.

Decision of incidental questions.

(1) Tyler, pp. 81, 89.

(2) Lieut.-Gen. Whitelock's trial, p. 7. Lieut.-Col. Johnstone's trial,

p. 3. Col. Quentin's trial, p. 349.

(3) See further remarks under those heads.

The court
must consider
the charges;

Court martial
reprimanded
by His Majesty
for receiving a
defective
charge;

may decline to
enter upon
a defective
charge;

457. It is not only within the power of a court martial, but a duty, the neglect of which may incur censure, to judge of the propriety of the charge, not only as regards the nature of it with reference to their jurisdiction, but also, whether the wording be sufficiently precise and the crime clearly defined. It would perhaps conduce to regularity, and might occasionally obviate much inconvenience, if courts martial were invariably cleared on the reading of the charge, before the arraignment of the prisoner, to consider its relevancy. Referring to the proceedings of a general court martial held at Ariscum, in Spain, on Captain Peshall, of the 88th regiment, the following paragraph appears in the general order of the 13th December, 1813, which promulgated the Prince Regent's confirmation of the sentence:—"I am further to acquaint you, that the Prince Regent considered that the latter part of the charge ought not to have been the subject of investigation before the court, as well from the *vagueness* of its *wording*, as from its forming a most serious and distinct subject of accusation in itself; but His Royal Highness at the same time remarked, that although the conduct of the prosecutor and *the court* appear to have been irregular, the one in preferring an accusation so indirectly framed, and the other *in receiving* it, yet that the circumstances detailed in evidence were of a nature to preclude the favourable consideration which might possibly be given to the case of Captain Peshall under a charge of absence from his regiment alone: His Royal Highness could not fail, therefore, to confirm the sentence of dismissal, but was graciously pleased to command that, under all the circumstances of the case, the prisoner should be allowed to retire from the service with the value of the commission he purchased, which appears to be his lieutenancy."⁴ The court martial on the trial of Lieutenant-colonel Austin, of the 60th regiment, "determined

(4) The charge against Captain Peshall was as follows: "For being absent from his regiment, without leave, from the 24th June, 1813, (the day upon which his suspension by the sentence of a general court martial terminated), until the 28th of the following July, during the whole of which period, his corps was employed on most arduous and active service in the presence of the enemy; this latter cir-

cumstance, of which Captain Peshall could not have been ignorant at the time, and the probability of which he must have known before the termination of his suspension, rendering his absence, without leave, at such a period, doubly culpable, and, coupled with his conduct on some former occasions, raising, at least, a suspicion that it was intentional."

that the first part of the fourth charge was too generally laid, for it to take cognizance of that part."⁵

458. Courts martial have no authority to arraign a prisoner upon charges other than those upon which he has been ordered for trial, unless such altered charges receive the sanction of the convening authority.

but have no authority to alter charges without the sanction of the convening authority.

459. The highest military authority cannot interfere with any of the proceedings of a court martial, much less dictate to it. If any point arise upon a question of law, or otherwise, respecting which the court requires advice or instruction, and which is not satisfactorily afforded by the officiating judge advocate, the court usually adjourns and, through the president, reports to the commander of the forces, or to the officer by whose authority the court was convened. The judge advocate is sometimes instructed by such officer, to communicate with the judge advocate general,¹ if the trial be held at home: or, if held abroad, to obtain the opinion of the attorney or solicitor general, or law authorities, on the spot. The members of courts martial would do well to recollect that although no court is competent to stay proceedings or revoke a sentence, they are collectively and individually responsible to the supreme courts of civil judicature, not only for any abuse of power, but for any illegal proceedings;² that the House of Commons has called for a copy of the record, and censured their proceedings as illegal and unjust,³ and more recently entertained a motion which, if carried, would have had the effect of fixing this imputation on a court martial.⁴

Independence of court.

Cases of difficulty.

Responsibility of members of courts martial to a court of law.

460. It is probable that officers are too much disposed to

(5) It was couched in these terms: "For conduct highly unbecoming the character of an officer and a gentleman, in being concerned in traffic."

(1) "If the opinion of the judge advocate general has been taken in the course of the trial, it is not usual to enter it on the proceedings."—*Judge Advocate General*, 11th June, 1807.

(2) Lieutenant Frye, of the marines, in 1743, brought an action in the court of common pleas against Sir Chaloner Ogle, the president of the naval court martial, which had convicted him of disobedience of orders, and sentenced him to fifteen years' imprisonment. It appeared that Lieutenant Frye had

been fourteen months in confinement, and that he had been convicted on illegal evidence,—the depositions of illiterate persons reduced to writing several days before the trial;—he had a verdict in his favour for 1000*l.* damages. The judge moreover informed him, that he was still at liberty to bring his action against any of the members of the court martial.—1 *M^cArthur*, (1813) 436.

(3) 1 *M^cArthur*, 266.

(4) Mr. Brougham's motion, 1st June, 1824, respecting the trial of the missionary Smith, at Demarara. The previous question was carried only by a majority of 193 to 140.

is not shared by
the judge
advocate who
attends the
court.

consider, that by acting upon the opinion of the officiating judge advocate, on questions of law, they are thereby exonerated from responsibility, both legally and morally. Instances might be quoted where the advice of judge advocates has been acted on, which could not be supported by reference to the established practice and decisions either of courts martial or courts of civil judicature; and the incorrectness of which advice, had members permitted themselves to question it, might have been easily detected. Whatever degree of deference may be due to the advice of the judge advocate, it must be remembered that he is not responsible to any court of justice for the opinion he may give. — The most equitable mind may insensibly be biassed in favour of that side which it is a duty to support; and, since it is the particular duty of the judge advocate to advise on the wording of the charge, and, if not to prosecute in the King's name as formerly, yet to watch the course of the prosecution, that it fail not from want of care in the manner of conducting it; the very reasoning which such duty must call forth, may tend to excite prejudice. Legal men are said to acquire a habit, difficult to be shaken off even by judges, of taking a side in every question that they hear debated; and it has been justly remarked, that when the mind is once enlisted, passions, prejudices, and professional ingenuity are always arrayed on the same side, and furnish arms for the contest. Influenced as every member ought to be, by any reasoning which may tend to correct his judgment, he is still bound by his oath to administer justice, when any doubt may arise, according to *his*⁵ conscience, the best of *his own* understanding and the *custom of war* in the cases.

Judge
advocate, how
appointed;

461. General courts martial are attended⁶ either by the judge advocate general, appointed by letters patent under the great seal; by a judge advocate, appointed by commission under the sign manual; by a deputy judge advocate acting by deputation, either general or special under the hand and seal of the judge advocate general; or by a person appointed to execute the office of judge advocate, at such

(5) See the reasons of one of the lords of the Admiralty for not signing the warrant for Admiral Byng's execution. — Smollett, vol. iii. p. 336.

(6) In the trial of the Canadian

rebels by martial law, in 1838 and 1839, three persons, one officer and two civilians, were "jointly and severally" appointed to the duty of judge advocate.

general courts martial as may be convened by general officers, commanding the forces abroad.⁷ The warrant held by such general officers contains a power to make such appointments from time to time, in *default* of a person appointed by Her Majesty or deputed by the judge advocate general, or during the illness or occasional absence of the person so appointed or deputed—and, in India and China, to delegate these powers to any officer duly authorized to convene a general court martial.⁸ The warrant of a judge advocate may at any moment be revoked by the authority which issued it, and a judge advocate may also be relieved during the course of a trial (§ 532), a substitute being duly appointed.

Judge advocate,

462. The presence and assistance of an officiating judge advocate, duly appointed, is essential to the jurisdiction of a general court martial. A general court martial at Portsmouth, in 1839, sentenced a soldier of the 8th regiment to be transported: it appeared that the officer officiating as judge advocate on the trial had not been duly appointed or deputed, in consequence of which there was in this case a failure of justice, the prisoner having been released, and his punishment remitted, though his conduct had been grossly insubordinate and his character was inveterately bad.

essential to the jurisdiction of a general court martial.

463. The judge advocate cannot, on any grounds, be challenged; but it has always been held that the officiating judge advocate should not (if it can possibly be avoided) blend the character of witness for the prosecution with that of judge advocate, as the union of these two characters gives upon the face of the proceedings the appearance of a preponderating and unfair influence against a prisoner on his trial.

Judge advocate not challengeable.

464. The duties of an officiating judge advocate are various and important; as will be apparent upon an attentive consideration of the preliminaries to a general court martial, and the whole of the subsequent proceedings. He summons the witnesses (§ 890), and it is his duty to take care

Duties, various and important;

(7) An adherence to the existing custom of the service would exclude the recommendation or appointment of a civilian to officiate as judge advocate. This was not unusual until a War Office circular directed the ap-

pointment of military men instead of "gentlemen of the law."—*War Office*, 6th April, 1802.—*Regulations* (1807) p. 485.

(8) See Forms in Appendix II. III.

that the prisoner has had notice of the intention to bring forward previous convictions.⁹ He provides, under the direction of the superior authority, for the accommodation of the court on assembling, and is authorized, if necessary, to hire rooms for the purpose.¹ He registers and records² all the acts of the court, all applications and requests submitted to it by either prosecutor, prisoner, or persons in attendance as witnesses; and all oral evidence, as nearly as may be, in the very words of the witness. He notes the hour of assembly and of adjournment and the cause, if the adjournment is at an earlier hour or for a longer period than usual; and, generally, all incidental occurrences, particularly the clearing of the court, the cause thereof, and, where interlocutory judgments are given, the decision. The judge advocate advises³ the court on points of law, of custom, and

(9) War Office Circular, 658, 24th Nov. 1830.

(1) The sum actually expended, as also for stationery, postage, fire, and other contingent expenses, is repaid on the production of the vouchers and the certificate of the president: officiating judge advocates, or deputy judge advocates not holding permanent appointments, include in this account their claim for the daily allowance under the royal warrant of two guineas for each day of actual sitting of the court, and for any intervening Sundays, but not for more than two days in the whole for the total number of adjournments. The amount is issued on foreign stations under the authority of the officer commanding on the station. At home, the account and certificate is transmitted to the judge advocate general.—Royal Warrant, 24th Sept. 1858, par. 33: Explanatory Directions, p. 157.

(2) The earlier articles of war required this office to be performed under the express sanction of an oath.—"At a general court martial there is a clerk who is to be sworn to make a true and faithful register of the proceedings of that court."

(3) *AMICUS CURIAE*.—It has hitherto been the avowed anxiety of military men to prevent their proceedings from being overlaid with unnecessary technicalities, borrowed from the civil courts, and it must surely be from inadvertence that "*Amicus Curiae*"

has been so prominently brought forward to designate the prisoner's friend, or a legal adviser of the *parties* before a court martial;—if this law term *must* be made use of at all, would it not be more applicable to the officiating judge advocate?

General Sir C. J. Napier, on the very subject of legal advisers, (*Remarks on Military Law*, p. 93) remarks that soldiers have a language of their own:—their coining a new word must find its excuse in the necessity which arises, when the *thing* exists without having a *name* which will at once suggest the idea. The same applies to the use of an old word in a new sense; and, so far, borrowing occasionally from the lawyers may be desirable, in order to prevent unnecessary circumlocution or inconvenient paraphrase.

In this instance, however, the already received words express all that is wanted and are not liable to be misunderstood: besides which the adoption of this law term into our military vocabulary appears the less desirable, as it has been appropriated in a manner so very foreign to that in which it is ordinarily used. Some little pains have been taken, but the expression has not been found anywhere in law books with a different sense from that in which it is used by Sir E. Coke: "If a judge is doubtful or mistaken in matter of law, a stander-by may inform the court as *Amicus Curiae*."—2 Inst. 178.

of form, and invites their attention to any deviation therefrom.

465. It is generally understood that the parties before the court have a right to the opinion of the judge advocate, either in or out of court, on any given question of law arising out of the proceedings, and whenever he is thus called upon to give an opinion in open court, it is the more correct course that it should appear on the proceedings together with the application. Mr. Tytler considers that the judge advocate is bound to assist the prisoner in the conduct of his defence⁴ but it is more in consonance with the custom of the service, that the judge advocate should only interfere to the extent to which the court itself is bound to interpose; to take care that the prisoner shall not suffer from a want of knowledge of the law, or from a deficiency of experience, or of ability to elicit from witnesses, or to develop by the testimony, which in the course of the trial may present itself, a full statement of the facts of the case, as bearing on the defence. To this extent, the court martial and judge advocate are bound, it is conceived, to offer their advice to the prisoner. Justice is the object for which the court is convened, and the judge advocate appointed; to this aim all their enquiries and attention ought to be directed, and if, in the prosecution of the design, the prisoner should be benefited, the efforts of the court, or of the judge advocate, will have been satisfactorily and legitimately exerted.

how far bound
to assist a pri-
soner.

466. If at any time, by inadvertence, a member, in passing sentence, should deviate from the letter of the law, or assume a power at variance with it, it is clearly the duty of a judge advocate to point out the error: but, in opposition to the opinion of Mr. Tytler,⁵ it is believed that, should the court decline acting on his advice, the custom of the service will not only prohibit a record of the judge advocate's dissent in form, but that it will exclude it in any shape; and that he will not, as a matter of right, be permitted to enter, on the face of the proceedings, any opinion, either on a controverted point or otherwise, which, at any period *when the court is*

not entitled
as a matter of
right to record
opinions given
in closed
court.

(4) Page 355.

(5) Page 354-5.

closed, he may think it his duty to offer.⁶ The record is confined to the proceedings of the court; it is not usual, nor would it be right, to detail the grounds which might have led the court to the result finally adopted. The decision only of the court, both as to interlocutory and final judgments, is made known, but in no case the details of any discussion or the judgment of particular members. As well may an individual member desire a right of protesting as the judge advocate, and on much more plausible grounds, the members of a court martial being individually amenable to a superior court of justice for the sentence which the court may record, whereas the judge advocate, having no deliberative opinion,⁷ is not, in any case, *legally* responsible.

If a court
persist in an
illegality in
its sentence,

467. Where a point of law has escaped notice, it is a rare occurrence for a court martial, after having been put on its guard against committing an illegality, to persist in opposition to an officiating judge advocate, if he has himself arrived at his opinion on sufficient grounds, and is able to bring them in a clear and intelligible manner to the attention of the members.

it may be
brought to the
notice of the

468. If the court will not attend to such suggestions as he may think it his duty to offer for their guidance upon a

(6) It is considered only right that the reader should be informed that this statement, (as to the inadmissibility of a claim on the part of judge advocates to record opinions, given by them in closed court) was called in question by several officers in the judge advocate general's department of the then company's army, who inclined to the opinion that the judge advocate has a right to enter a protest on the face of the proceedings.

It is believed that such pretensions have never received any countenance in the judge advocate general's department at home: and it may be further urged, in defence of the opinion above given, and first published by the author in 1830, that it was offered as his impression of the custom of war in like cases, but not without consideration or availing himself of more extended experience.

After some thirty years' practical acquaintance with the customs of Her Majesty's service, though still unavoidably ill-informed as to any exceptional usages in the army in India,

he did not alter this passage in the second edition, which was the last that had the advantage of being revised by him. From subsequent remarks upon it, he learnt what may have been a practice, often acquiesced in, (but, it may be observed, in many cases not allowed) by courts martial in that country; but after several years' experience as a deputy judge advocate, he had no wish to see it adopted elsewhere;—he conceived that the existence of a right, such as that contended for, might tend to promote dogmatism in the officiating judge advocate and to make members less likely to listen to arguments, to which, if offered without assumption, they would readily attend.

(7) "The judge advocate can do no more than submit his opinion to the court: he cannot prevent a determination contrary to his opinion, and of course is not responsible for such determination."—Sir Charles Morgan to Mr. Tytler, (at that time deputy judge advocate in North Britain), 27th May, 1799.

point of law, it then becomes the duty of the judge advocate, in order to prevent the confirmation or execution of a sentence which may not, in his opinion, be warranted by the law, to transmit the proceedings to the judge advocate general at home, or to the confirming authority abroad, "together with a statement of those circumstances which he considers material as affecting the legality of the proceedings."⁸ A confidential communication of this sort was allowable when the oath of secrecy taken by the judge advocate did not extend to the sentence of the court, and it is now provided for by means of the exception, which was inserted when an addition was made to the form of oath in the year 1844.⁹

superior authority by the judge advocate,

under an exception, expressly made in the oath of secrecy.

469. The articles of war of 1860 provided that the officiating judge advocate¹ shall in no case act as prosecutor.² By the custom of the service, the duties of prosecutor more frequently devolve on the person who may have originated the charge, on the prisoner's commanding officer, or on a staff officer ordered to perform the duty; occasionally, where the accusation involves distinct transactions, the conduct of the prosecution is entrusted to different persons as they may be more particularly acquainted with the several circumstances to be investigated; it is, however, always considered to be at the suit of the crown. It may be

PROSECUTOR.

Prosecution always at suit of the crown.

(8) Extract.—Letter, Judge advocate general to a field officer who had stated that in his opinion, the court at which he was officiating as judge advocate, was proceeding to give an illegal sentence, and that it appeared to him, that "if the deputy judge advocate is not to enter his opinion on the proceedings, he may be supposed to have concurred with the court, and thereby incur undeserved censure."

(9) See Form (§ 440), where the addition is shown in *italics*.

(1) The judge advocate formerly instituted proceedings before courts martial, by virtue of his appointment, as in the present day the attorney general files *ex officio informations*, and in all cases where a prisoner was committed to the marshal *general*, it was provided that the *informations* against him should be given to the judge advocate within eight and forty hours of his commitment.

An acquaintance with the sense in which "to inform" was originally introduced into our military code, would have spared much discussion by writers on military law. The earlier articles of war were worded as follows: "In all criminal cases, which may concern the crown, his majesty's advocate general or judge advocate of the army, shall *inform* the court, and prosecute in his majesty's behalf:"—until the alteration of the articles in 1829, the article required the judge advocate to prosecute, and "to inform," that is, 'to prefer an accusation' continued in the margin, although expunged from the body of the article.

The duty of the judge advocate to advise the court on points of law arises in the practice of courts martial, and not from having been prescribed by any ancient ordinances requiring him to inform the court.

(2) Art. War, 162.

observed, that no person can appear as prosecutor before a court martial, who is not subject to martial law, except, perhaps, in places beyond the seas, where there may be no form of English civil judicature, and the court martial is especially convened for the trial of offences not military. A prosecution may, and often does, take place at the instance of a person not himself in the service, who in this case is sometimes called the *informant*; after giving his evidence (which should obviously be the first received,) he is allowed to remain in court, that the actual prosecutor may receive his suggestions and be able more easily to refer to him; but the prosecutor alone, as would appear due to consistency, counsel not being admitted in court to reply to an accusation, can dilate on the charge.³ Civilians, appearing before courts

(3) Mr. Tytler (p. 208) offers a different opinion; he refers to the case of a surgeon prosecuted at the suit of a coroner, for neglect of duty, in not paying proper attention to the sick: he does not state that the coroner was the actual prosecutor; he was no doubt the informer, probably the principal witness, and at his instance, the prosecution might have been instituted; but it is doubted whether he was permitted, as prosecutor, to address the court, and thereby to acquire the right, if not to incur the obligation, of obtruding his opinions upon the peculiar and military duties of a medical officer. The paragraph referred to does not appear to have been written with the accustomed discrimination and judgment of this author, or he would have spared himself the trouble of remarking, that "a prosecution may be brought in a court martial at the suit of a person who is himself not subject to military jurisdiction, *provided the offence be of a military nature, and committed by a person under the military law.*" It never could be imagined that a person not subject to military law could be brought to a court martial; or, if it were possible, that a court would entertain such a charge against him: and surely, if a civilian were subjected to the jurisdiction of a court martial, in consequence of a declaration of martial law or active operations in the field in a foreign country, it would be less objectionable that a prosecution, conducted by a civilian, should be for

an offence not of a military nature.—Mr. Samuel (p. 389) has justly remarked on this subject: "There would seem as little reason as justice in admitting the civil classes, generally, to become suitors in a military court. The parties would stand there, in the first place, on a very unequal footing with respect to one another; the responsibility being all on one side. The court martial may punish one party if he should be found to be an offender, while it can give no redress against the other, in a contrary event, for a vexatious or malicious prosecution. There is not either any more equity in the penalties to be awarded, than reciprocity in the distribution of justice, inasmuch as the military offender might be absolutely ruined in his fortune and his prospects by the adverse event of a prosecution; when a civil party would escape, in his own courts, with a nominal penalty. One need not go further than to advert to the misdemeanour of sending a challenge, which, in subjecting the officer to be *cashiered*, may act as a large pecuniary forfeiture, possibly of all he is worth, besides depriving him of the advantages of his previous service, and the future means of life, while it would expose the other to a trifling fine, and possibly a slight imprisonment. There would seem no fairness in the strife where the odds are so vast. The author has known instances of very unprovoked and wanton challenges, and of gross assaults committed by officers, wearing at the time

martial, should be precluded, in their character of witnesses, from offering any remark, and confined to the testimony they may have to offer. Incalculable difficulties and embarrassments would arise from a dereliction of this salutary custom.

470. No proceedings in open court can take place except PRISONER.
in the presence of the prisoner. Prisoners are occasionally

attended by the provost marshal; at other times, by an escort or guard, or by a commissioned officer, as his rank or the nature of the charge may dictate, if officers without sword or sash (§ 353), if soldiers without their caps, or any other articles they can make use of as missiles.⁴ The custom of all English courts of judicature prescribes, that the prisoner, having pleaded, has a right to demand that, during the trial, he may be without irons, unfettered, and free from bonds or shackles of any kind, unless there be danger of escape or rescue,⁵ but a court martial has no control over the prisoner, except during his continuance in court; when the court adjourns, the provost marshal, or the brigade, garrison, or regimental authority, resumes the entire authority and superintendence (§ 356).

Prisoners are
always present
in open court.

471. Accommodation is usually afforded on the application of the prisoner for any friend or legal adviser, the benefit of whose assistance he may desire during the trial;

their military uniform; and of charges having reference to them, being afterwards preferred to the commander in chief on the spot; which were not however entertained by him, on the impression, and, as it would appear, a just one, that the matter, in respect of the *persons* implicated in them, belonged to another forum. It is not denied, but that the same violences, if attended by circumstances which are supposed to throw a discredit on the body of the army, might become the subjects of a prosecution in the military courts; but then it must be on the relation of a military suitor; or possibly, after the common law courts have enquired into them, through indictments preferred for that purpose, they may be subsequently brought

under the cognizance of a court martial, if anything should turn out upon the trials, calling for such further proceedings, in interest of the concerns of the army, under the 18th * clause of the mutiny act. Except in this way, it is hardly to be wished, from the reasons assigned, as well as for the additional trouble it would give to the military tribunals, that these mixed injuries should be brought before them. The common law is fully competent to redress the wrongs of those who are placed under its peculiar protection, and to whom the military law is, as it were, a foreign law."

(4) Queen's Reg. p. 121.

(5) 1 Leach, 43.

* Now the 39th.—but officers, though liable to be cashiered, are no longer amenable to a court martial.—See before, note, § 33.

Counsel not permitted to address the court, but may advise prisoner.

but permission, as respects any person so employed, may be revoked by the court, in case of any misconduct rendering it necessary. The parties only are permitted to address the court, it being an admitted maxim on all courts martial that counsel are not to interfere in the proceedings, or to offer the slightest remark, much less to plead or argue; but a prisoner is not precluded the advantage of the presence and advice of any military or private friend, or debarred from retaining a professional adviser, if he thinks it advisable to employ one. Courts martial are then, more than ever, particularly guarded in adhering to the custom which obtains of resisting every attempt to address them on the part of any but the parties to the trial; a lawyer is not recognized⁷ by a court martial, though his presence is tolerated as a friend of the prisoner, to assist him by advice in preparing questions for witnesses or writing them out for him, in taking notes, and in shaping his defence.

INTERPRETER

must always be examined on oath.

Form of oath

may be either regularly detailed for the duty,

or a member,

472. An interpreter may be sworn at any period of the proceedings, if required by either party, or judged necessary by the court. The mutiny act requires that he be duly sworn⁸ or make a solemn affirmation before being examined; but there is no form of oath prescribed; the following is very generally used: I, A. B., do swear that I will, to the best of my ability, faithfully and truly interpret and translate in all cases, in which I shall be required so to do, touching the matter now before the court. So help me God.

473. In India there is a regular establishment of interpreters, whose appointments depend upon their ability to pass a prescribed examination. In the colonies, courts martial usually call upon the regular interpreters before the civil courts, when their services are available.⁹ A member of the court is not disqualified from that circumstance; on the contrary, where assistance of an interpreter is required during the deliberation of the court with closed doors, not an unfrequent occurrence when there were foreign regiments

(7) It was expressly provided by the Irish coercion act, that persons tried by courts martial under its provisions might have the assistance of counsel and attorneys.—See note, § 35.

(8) Mut. Act., sec. 13.

(9) On foreign stations, charges for interpreters are made and allowed, in conformity with the treasury circular, regulating the payment of the expenses of "witnesses, &c."

in our service, a member should obviously be preferred. A proper attention to the appearance of fairness would suggest the impropriety of receiving the interpretation of the judge advocate, and absolutely preclude that of the actual prosecutor, or any other interested party.¹

but not the
judge advocate
or prosecutor.

474. The greatest caution should be exercised to ensure faithful translation, and to guard against misconception of the true meaning of any expression, either from the incompetence, or from the possible bias of the person employed to interpret. The interpreter should render the very words as closely as possible, and not run the risk of obscuring the proper force of an expression by attempting to give the corresponding idiom, as the court may call upon him to explain any part of his translation, or refer to a second interpreter, if they should entertain any doubt, or be desirous of further information.² A party to the trial is at liberty to request the presence and assistance of a private interpreter, and may urge upon the court the propriety of hearing his version of the precise meaning of evidence, or any illustration on his part of a phrase which will admit of a second construction

The court
should take
all due care
to ensure a
translation.

The court
alone can de-
cide on cases
as they arise
with a view to
the due admin-
istration of
justice.

(1) Remarks by Lieutenant-general Sir Thomas M'Mahon, commander-in-chief at Bombay, on a general court martial, held at Karrack, on the 6th April, 1841:—

"An attentive perusal of the proceedings in this case has impressed me with the full conviction of the correctness of the finding on both charges, and of the justice of the sentence; and I regret to observe, that no point of extenuation presents itself by which I could have considered myself justified in withholding my confirmation from the award of the court, had not a material, and what has been previously deemed a vitiating illegality occurred in the proceedings, by the officiating judge advocate, by whom the prosecution was wholly conducted, having also been allowed to perform the duty of interpreter in the examination of several witnesses, both on the prosecution and defence. The illegality of that proceeding was first noticed and animadverted on by General the late Marquis of Hastings, (then Earl Moira,) when commander-in-chief in India, and the sentiments of that eminent ornament of the

British army, who was deeply versed in every branch of military jurisprudence, form a part of the military code of this presidency, sec. 20, art. 108, p. 143, wherein the practice now adverted to is, without reservation or qualification, declared to be contrary to the principles of justice; and in a subsequent case which occurred in this army, the proceedings were on the same grounds set aside by the then commander-in-chief in the year 1816. With these precedents, therefore, before me, I cannot give effect to the present sentence, passed under the invalidating circumstances before referred to. Ensign ——— has thus narrowly escaped the loss of his commission, and I trust that the lamentable position to which his acts of insobriety had reduced him, will ensure a lasting reformation in his conduct."

(2) There are obviously many cases where it would be desirable to retain the original in the proceedings, but in no case without a translation, as many expressions may present no difficulty on the spot, and yet be wholly unintelligible to the confirming authority.

being put upon it; and the court, under all the circumstances of the particular case before them, would decide on an application of this nature, neither allowing unnecessary interruption on the one hand, nor obstructing the accurate investigation of justice on the other.

The Proceedings.

The proceedings are recorded under the superintendence of the president.

These minutes should contain a record of everything bearing on the trial:

The names, &c. of the members,

and judge advocate;

a note of their absence.

Proceedings, how recorded,

475. The proceedings of all courts martial are reduced to writing by the officiating judge advocate (§ 464) on general, and by the president or a member under his superintendence, on other courts martial. The object of this report of the proceedings is that the superior authority may be aware of everything bearing on the trial, which has transpired or taken place in open court. Not only is the evidence taken down, as directed in the Queen's regulations, (§ 464, 478) and the judgment recorded, but all questions rejected by the court, and all incidental transactions, are noted on the face of the proceedings.

476. The names of the members are registered in the proceedings according to seniority, and the regiment of each is invariably to be annexed to his name, and, if on the staff, his rank and situation are to be distinctly stated. The name of the judge advocate is in like manner to be added under those of the members.

477. In the case of the secession of a member or the absence of the prosecutor, prisoner, or a witness under examination, it is noted on the face of this record, and the cause, when susceptible of proof, is shown by evidence; if arising from illness, by the evidence of a medical officer: or, if the subject of enquiry be a civilian, by other medical practitioner.

478. Not only is care to be taken that the minutes of the proceedings of all courts martial be fairly and accurately recorded,³ but the Queen's regulations further point out

(3) Queen's Reg. p. 223. The general regulations (*Edit.* 1837, p. 247) explained that the president was held strictly responsible for this:—but it is the duty of any member, observing an inaccuracy or omission, to call attention to it—and, if there should

be a difference of opinion on this point, it is referred as other incidental questions to the decision of the court. The correction of his deposition by a witness under examination is spoken of under that head. (§ 960.)

It appears that it used to be the

that this must be done in "a clear and legible hand, without erasures or interlineations; the pages of the minutes are to be numbered, and the sheets (when more than one) are to be stitched together." The record itself, usually termed *the proceedings*, is made up separately⁴ upon each new trial, and authenticated at the close by the president, with the date of signature annexed, and is also countersigned by the judge advocate.

479. The judge advocate on general courts martial at home transmits the proceedings to the judge advocate general in London, when the prisoner belongs to Her Majesty's land forces, in order to being laid before the sovereign; and abroad they are in like manner to be transmitted to him after having been finally disposed of by the confirming authority.⁵ The proceedings of general courts martial, held abroad, (except in India, China, and in any army where from time to time the like full powers⁶ may be given (§ 729, n.) to the general commanding in chief) are also transmitted to the judge advocate general, in order that he may lay them before the Queen;⁷ in all cases, where officers are adjudged to suffer death, or penal servitude, or to be cashiered, discharged or dismissed, and in other cases where the general officer may think proper to suspend the execution of any sentence.⁸

480. The proceedings of general courts martial are carefully preserved in the office of the judge advocate general in London. The proceedings of district or garrison courts martial, after they have been confirmed and promulgated, are forwarded by the president, and are in like manner preserved.

481. When a general or district court martial, before which a soldier may be brought, on the report of the court of enquiry that his maiming or mutilation was the effect of design, the proceedings are sent through the judge advocate general, the commander in chief, and the secretary for war,

custom for the judge advocate to read the examination of a witness as taken down, and "to ask first the evidence, then the prisoner and the court, whether they were satisfied with it as expressing the meaning of the deponent."—*Grose*, vol. 2, p. 164.

(4) Queen's Reg. p. 221.

(5) Art. War, 160. Queen's Reg. p. 224, par. 19.

(6) See Warrant, Appendix II. III.

(7) Art. War, 160. Queen's Reg. p. 224.

Transmitted for consideration to the confirming authority,

and when promulgated, carefully retained in the office of the judge advocate general.

except in the case of a soldier tried for self-mutilation and found guilty of design.

to the commissioners of Chelsea Hospital, in order that they may, when the case comes before them, have the best means of arriving at a just decision, either to grant or withhold a pension.⁸

Regimental and detachment courts martial.

482. The proceedings of all regimental and detachment courts martial are entered in the court martial book (§ 316, 324) as are also copies of the charges, finding and sentences of general, district, and garrison courts martial, in the officers' court martial book, or the court martial book, as the case may be.⁹

Party tried by general or district courts martial is entitled to copy.

483-9. The articles of war provide that every person tried by a general, district, or garrison court martial, or any person on his behalf, is entitled, on demand made within three years from the date of the final decision on the proceedings, to a copy of the proceedings and sentence (paying for the same at the rate of fourpence per folio of seventy-two words), whether such sentence shall be approved or not, as soon after the receipt of the proceedings at the office of the judge advocate general as such copy can conveniently be supplied.¹⁰

Copies of proceedings of regimental courts martial have been given on the request of the soldier.

Copies of the proceedings of regimental courts martial are not given as a matter of right, but they have been occasionally granted upon application of the person tried.

(8) Art. War, 86.

(9) Queen's Reg. p. 391.

(10) Art. War, 161. This provision was contained in the mutiny act until

1860. It was for the first time extended to district and garrison courts martial when transferred to the articles of war.

CHAPTER XIII.

ASSEMBLY OF THE COURT AND INCIDENTS ON
ASSEMBLING; CHALLENGES.

490. THE officers appointed to serve on the court martial¹ assemble according to order, (§ 426) together with any others who may have been directed to be "in waiting" in order to prevent delay in the event of any officer failing to attend, or to replace any officer in respect of whom a challenge may be allowed. The officiating judge advocate takes care that accommodation for the court and parties to the trial has been provided at the time named for the assembly of the court (§ 464); and the Queen's regulations require that "all official orders and memoranda having reference to the proceedings of military tribunals are to be laid before courts martial when sitting."² The provost marshal, his deputy or orderly non-commissioned officers performing the duty, are previously placed under the orders of the officiating judge advocate for summoning witnesses, giving notice to the members of time of meeting, and generally for giving such attendance as may be required. Upon the trial of an officer it is usual for an orderly officer to be in attendance on the court during its sitting. If there be no provost marshal guard, a guard or sentries, as may be necessary, are furnished, and receive orders from the judge advocate.

Assembly of
officers for the
court.

Accommodation
of the court.

491. The presence of the requisite number of officers (§ 14, 526) having been ascertained, and any preliminary business having been disposed of, the court is proclaimed

The number
of officers fixed
in orders being

(1) This and the succeeding chapters more particularly refer to trials of prisoners by general courts martial; but the form of procedure in all courts martial is essentially the same, and, where they are not obvious, attention

is drawn to the necessary modifications on trials of appeal from regimental courts of enquiry, and in the procedure of minor courts.

(2) Queen's Reg. p. 223.

present,
the court
opens,

and may forbid
the publication
of its proceed-
ings during the
trial;

and take their
seats.

Judge Advocate

and parties to
the trial.

WARRANTS and
ORDERS READ.

General court
martial.

district or
garrison
court martial,

open (§ 454) by the provost marshal, sometimes by an officer or by an orderly serjeant who is in attendance. The prisoner, prosecutor, and witnesses then appear in court, but withdraw from time to time when it is cleared by order of the president, for deliberation or upon any incidental discussion. The president also gives notice in those cases where the court martial may think proper to forbid a publication of a report of the proceedings of the trial during its continuation.³

492. The president, who must in all cases be a combatant officer (§ 15), takes his seat at the head of the table, and the judge advocate calls over the names of the members, who "take their seats according to rank,"⁴ alternately to the right and left, officers of the regimental staff, or of the civil departments, sitting and voting by seniority, according to their relative rank.⁵ The judge advocate's writing table is usually placed on the right of the president; when requisite, accommodation is also afforded for the prosecutor, on the left, and for the prisoner or his friend, opposite to the president.

493. When the court is assembled by virtue of a special warrant under the sign manual, it is read by the judge advocate general or his deputy. At other trials by general courts martial the order for the assembling of the court is read, and the warrants of the president and judge advocate uniformly and necessarily so; in these warrants the authority under which they are issued, either a warrant under the sign manual, or the warrant of a commander in chief duly authorized to delegate such authority, is invariably referred to. The custom of reading or laying before the court the warrant (or a certified copy) giving authority for its convention, has for the most part fallen into disuse, although, from the form of warrant, this formality might seem to have been originally contemplated.⁶ In the case of a district or garrison court martial, the order assembling the court and appointing the president is read, and it is moreover necessary in those cases where the court is assembled by any officers other than those authorized under the sign manual,

(3) See before, § 454.

(4) Art. War, 165.

(5) Queen's Reg. p. 5.

(6) "And for executing the several powers, matters and things herein ex-

pressed, *these shall be to you as to the said general courts martial, and all others whom it may concern, a sufficient warrant and authority.*" See Forms in Appendix.

and where existence of a sufficient warrant cannot be presumed as a matter of course, that it be made appear, in some shape or other, that the officer convening it has been duly authorized:—a notification to that effect may be made in public orders, or the warrant, or a copy, may be laid before the court. Officers commanding regiments and detachments are empowered to assemble regimental and detachment courts martial without other authority than the articles of war.

regimental or
detachment
court martial.

494. When not specified in the order for the assembly of the court or in the president's warrant, (which it may be observed, (§ 273) is no longer the ordinary practice) it is proper at this stage of the proceedings to read either the charge signed by the convening officer himself, or "by order" by an officer of the head quarter, brigade or regimental staff, according as it may be a general, district, or regimental court martial; or the authority for a prisoner being tried on the charges preferred against him, or for the court entering on any other enquiry, as the case may be—the court has thus brought before it the *matter* touching which they are about to swear that they will duly administer justice, and are formally required to enter on enquiry.

Matter of en-
quiry brought
before the
court.

495. After reading the orders for the assembly of the court and the trial of the prisoner, and the warrants of the president and judge advocate, the names of the president and the other officers appointed to serve on the trial are read over in the hearing of the prisoner, each officer answering to his name. The judge advocate (at courts martial other than general, the president) then asks the prisoner,⁷ or if several are tried together asks each one separately, whether he objects to be tried by the president or by any of the other officers.

After the war-
rants and orders
are read,

and the mem-
bers have
answered to their
names,
the challenge is
proffered to the
prisoner.

496. A prisoner cannot challenge *the court generally*:—

(7) Qualified challenges, both by the prisoner and by the judge advocate or prosecutor on the part of the crown, were formerly allowed. As the mutiny act now expressly provides for the exercise of the right of challenge by the prisoner, and does not mention challenges on the part of the crown, it is a question how far these last may be admissible.

With respect to challenges on an appeal from a regimental court of enquiry, there is not the same difficulty, as the provision of the mutiny act only extends to the trial of prisoners, and in no way interferes with the previously established custom of allowing challenges on the part of either party to the appeal.

The prisoner may object to individual members or challenge the composition of the court.

Challenge of president referred to the superior authority:

of any other member, decided by the remainder of the court.

Course adopted when two or more officers are challenged.

The place of officers who are set aside,

until sworn in, it is not competent to decide upon questions in the nature of pleas in bar of trial. Nor can a prisoner challenge the whole of the members collectively, but he has a legal right to object to every individual member composing the court. The prisoner also may object to the composition of the court, (§ 18-29, 303,) for defect in rank, or otherwise.

497. Should the prisoner object to the president, the objection to him is made, and, together with the evidence, recorded on the proceedings, in the same manner as on the challenge of any other member. It cannot however in like manner be disposed of by the court, when unfounded, except it may be disallowed by two thirds at least of the other officers appointed to form the court.⁸ Where a larger minority than one third desire to refer it, or where the objection appears well founded, it is referred to the decision of the authority by whom the president was appointed, the court separating for that purpose.⁹ If the prisoner object to any officer other than the president, the objection is decided by the president and the other officers appointed to form the court,⁹ but no steps are taken with respect to a challenge of any other officer, so long as an objection to the president has not been disposed of. It may be added that, in any other case where a prisoner challenges more than one officer, he is required to state his objections to them, separately, and in the order of their rank, and courts martial usually consider the objections one by one, and make known their decision upon each before entering upon another.¹

498. When the whole of the objections have been gone through by the court, either the officers, in respect of whom challenges may have been allowed, are replaced at once from the officers in waiting, or, when no officer has been put in orders for this purpose or there are not sufficient, any

(8) Compare § 616.

(9) Art. War, 154. These provisions apply to every description of court martial, and were first inserted in the mutiny act of 1847, which thus fixed what had gradually become the prevailing practice of the service.

(1) There is no regulation on this subject, nor indeed, owing to the unfrequency of challenges, is there any well-established custom; but where

several officers have been challenged, the above has been the general practice.—It would appear to be calculated to obviate inconveniences in every case, and some expedient of the kind must necessarily be resorted to, in the event of every member being challenged, a circumstance which has occurred, and in more than one instance.

further proceedings must be suspended until officers are obtained to make up the number, of which the court may have been originally composed. Should any inconvenience attend the supplying of the vacancies, if the legal minimum still remain, it rests with the superior authority to dispense with the swearing in of the additional number.³

supplied by
other officers,

499. Should a fresh president be appointed he is of course subject to challenge, as are also the officers who may supply the place of those in respect of whom objections may have been allowed by the court:³ the judge advocate, as before observed, (§ 463) is in no case challengeable.

who are subject
to challenge.

500. Peremptory challenges, or challenges without cause assigned, are not known to courts martial; the prisoner must in every case state his objection, which, together with the statement of any witnesses, is entered on the minutes of the court, as other parts of the proceedings. Should any officer, other than the president, be challenged, the cause of exception being detailed and a reply or explanation offered, if the case be susceptible of such, which is also entered on the face of the proceedings, the president directs that the court be cleared, when it proceeds to deliberate and decide on the assigned cause of exception. The court, it may be observed, must decide on the *assertion* of the individual challenging, of the officer challenged, and of the witnesses adduced; since there is no authority to receive evidence on oath, before the administration of the prescribed oath to the members. The member, in respect to whom the objection has been made, receives the president's permission to withdraw on the clearing of the court; or for the want of a decisive custom in this respect retains his seat, but without voting on the question: it may be more desirable that the officer challenged should retire during the deliberation, as it would promote freedom of discussion; but it must be confessed that a contrary practice has been not unfrequently observed. In general, an officer, objected to on the score of prejudice or malice, requests permission to withdraw altogether, and the court ordinarily feels disposed to comply, when it can yield consistently: Sir Edward Blackstone has well remarked, that upon challenges for

Challenges
peremptory
unknown,
the prisoner
is called on
to state his
objection; which
is also entered
on the face of
the proceedings.

How disposed of
by court.

(2) See § 14 and § 526.

(3) Art. War, 154.

cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may provoke resentment.⁵

Decision as to
challenge made
known in open
court.

501. The other officers having come to a decision as to the allowance of the challenge, and the officer whose case has been under consideration being aware of the result, the parties are called into court and the public is admitted. The decision is then made known in open court, and the member objected to, either retains his seat, or else is set aside in order to being replaced, as above pointed out, by some other officer.

Cause of
challenge;

502. Challenges to particular jurors have been reduced by lawyers to four heads: *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*. No question, connected with the first class, can arise for consideration by a court martial, and it would be difficult to imagine a case to be classed under the fourth. It is possible, however improbable, that challenges may arise, depending on the second class; as if, by inadvertence, an officer, under the degree of captain, were about to take the oaths and proceed to the trial of a field officer; or, if a young officer were nominated a member of a court martial, without having previously attended the proceedings of such courts.⁶

defect in rank ;

defect from
inexperience ;

prejudice or
malice.

503. The most frequently occurring causes of challenge, — or rather the least infrequent, — fall under the third head; — for suspicion of prejudice or malice. It is unnecessary, were it even possible, to enter with minuteness on this subject. The grounds of challenge are necessarily the same in all courts, but depend entirely on the facts of the particular case and the view the court may take of them. Each cause of prejudice must vary in complexion and degree, and can only be decided by the opinion of the members of the court martial, in whose breast it is to distinguish that degree of prejudice or malice which may render the exception to a particular member conclusive.

Principal
causes of
challenge of
jurors; *propter
affectum*,

504. According to Blackstone, *principal* challenges of jurors challenged for suspicion of bias, or partiality, are, “where the cause assigned carries with it, *primâ facie*, evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree;

(5) 4 Commentaries, p. 353.

(6) Queen's Reg., p. 220.

that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: all these are principal causes of challenge, which, if true, cannot be overruled; for jurors must be *omni exceptione majores*.⁷ Now, the greater part of these causes of principal challenge may arise on courts martial, and it cannot be questioned that it is equally necessary as on juries, that members of a court martial should be *omni exceptione majores*. Still, however, it must be borne in mind, that there is not an equal facility of replacing a member of a court martial and a juror in an ordinary trial; and that great inconvenience to the service, if not a failure of justice, must often arise if frivolous causes of challenge were admitted.

may apply in most cases on courts martial;

505. The having declared an opinion unfavourable to the prisoner *maliciously*, is a good cause of challenge; but if it shall appear that the juror made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge.⁸

having delivered opinion of prisoner maliciously,

506. A juryman has been set aside on a trial for high treason, because, when looking at the prisoners, he uttered the words "*damned rascals*:"⁹ such ground of challenge would, no doubt, avail against a member of a court martial. The having expressed an opinion of the prisoner on the charge in question, is held sufficient ground of exception:—"In the year 1718, an officer was tried by a court martial at Gibraltar, for killing another; the prisoner challenged two of the members; the first, for tampering with one of his witnesses; the other, for declaring before the trial came on, that he deserved to die: both were proved, and admitted by the court to be just and reasonable exceptions; whereupon they were both dismissed, and others sworn in their room."¹

or on the crime charged;

507. In December, 1828, a soldier of the 85th regiment was brought to a court martial for attempting to steal the property of an officer, who by inadvertence was placed as a member on the trial. The prisoner was found guilty; but,

member interested or injured;

(7) 3 Commentaries, p. 363.

(1) Simes's Military Library, vol.

(8) Hawkins, p. 589.

iv. p. 64.

(9) *State Trials*, O'Coigly.

on the opinion of the judge advocate general, the sentence was remitted, from the circumstance of the officer, to whom the property in question belonged, being a member.

having been
on regimental
court of enquiry
appealed from.

508. Before the alteration of the law, (§ 317) on appeals from a regimental to a general court martial, the having been a member of such regimental court martial was held a sufficient cause of exception, and the same holds good as to members of the court of enquiry. (§ 512.)

The being of the
same regiment
or company
with prisoner,
inadmissible.

509. The objection, that the member is of the same regiment or company with the prisoner, or of the same regiment with the president, is inadmissible.

Commanding
prisoner's
regiment.

510. A commanding officer of the prisoner's regiment, *as such*, has been objected to, and the validity of the challenge admitted, possibly upon the supposition that prejudice might exist from previous imperfect, or *ex parte*, knowledge of the circumstances inducing the trial. The mutiny act and articles of war formerly rendered² the commanding officer of the prisoner's regiment ineligible as president, as such, and an opinion has been given on the highest authority, that a prisoner's commanding officer sitting on the court martial for his trial, although not rendering the sentence invalid, is an "inexpedient proceeding." If the commanding officer had taken an active part in promoting the prosecution, or in bringing forward the charge, his sitting as a member would be highly objectionable under any circumstances; and if alleged as a cause of challenge, should obviously be allowed.

Material
witness;

511. It is a valid cause of challenge, that a proposed member is a material witness and summoned on the trial; but if required to give evidence as to character only, the objection is not admitted. If a member, not having been challenged, shall have taken the oaths and his seat, and shall in the course of the trial be examined as a material witness, he is not thereby disqualified from discharging his duty as a member of the court martial. (§ 647.) Circumstances may, however, occur, which may render it a subject of regret that the duties of a member and a witness were united. Should the cross-examination be calculated to create irritation in a member, it must be more consonant with his feelings, and may probably be more accordant with the custom of civil

(2) See the existing provisions, § 16.

courts,³ were he not again to resume his seat; but this can only be where the members exceed in number that required by the mutiny act and articles of war. Such a necessity has not arisen within the experience or knowledge of the author. Should it occur, it may be advisable to adjourn the court, in order to obtain the concurrence of the authority convening the court martial for the secession of the member.

512. An officer's having been a member of a court of enquiry held to investigate the subject of the charge, the court having given an opinion, is admitted to be a valid cause of challenge; and it is generally held that it is equally valid where the court has *not* given an opinion, although a contrary position has been maintained by a well-known writer on this subject.⁴ It will be granted without difficulty that a judge or juror ought, as far as practicable, to enter upon the investigation of a charge without prejudice, without the bias which *ex parte* statements are calculated to create. Now, the proceedings before a court of enquiry may be, and generally are, *ex parte* statements, tending to attach criminality, or to discover facts upon which subsequent charges may be built, and not upon oath. If the accused be permitted to enter on explanation, the statements in his favour are equally without the sanction of an oath, which the custom of all courts, and the statute law as to courts martial, render necessary. It would therefore, it is apprehended, be quite incompatible with a fair and equitable trial, that a member of a court martial should be thus exposed to the impression of statements by individuals neither on oath, nor subject to cross-examination.

513. There is another point having near affinity to this, respecting which the author of this work took a view of the custom of the service diametrically opposed to that of the author, above referred to. He specifies "the having been a member of a general court martial, in which the circumstances about to be investigated have been discussed,

having been a member of a court of enquiry on the subject of charge :

having been a member on a collateral trial, not in itself a valid cause of challenge.

(3) "It seems agreed that it is no exception against a person's giving evidence either for or against a prisoner, that he is one of the judges or jurors who are to try him; and in the case of Hacker, two of the persons in the commission for the trial came off

the bench, and were sworn, and gave evidence, and *did not go up to the bench again during his trial.*"—3 Hawk., 608.

(4) Kennedy on General Courts Martial (London, 1825), p. 20.

either principally, collaterally, or incidentally," as a "sufficient exception to a member objected to;"⁵ and this on the ground, "that members of a court martial should come to a trial as little acquainted as possible with the subject to be tried, and perfectly free from every bias and impression which a previous discussion of its merits, however incidental, could not fail to leave on the member's mind;" and yet it is asserted, as before observed, (§ 512) that the objection to an officer's having been a member of a court of enquiry cannot be allowed, if the court had not given an opinion. — A collateral or incidental allusion on oath, or a discussion resting on facts supported by legal evidence, in the course of a regular trial, is therefore considered more calculated to create prejudice and poison the stream of justice than an *ex parte* or declamatory statement not on oath. Although the reasoning cannot be acquiesced in by which a distinction is drawn between officers who may have served on courts of enquiry *giving* and *withholding* an opinion, yet it is not difficult to trace the probable origin of this notion. Mr. Tytler, advertng to the common law, and the affinity which courts of enquiry bear to grand juries, observes, "No grand juror, who has found a bill of indictment against a prisoner, can be a member of the petty jury on the trial of that prisoner, or even on the trial of another wherein the same matter is in question;"⁶ and thence he infers, "that it is sufficient ground for challenging a member of a general court martial, that he has given his opinion of the cause in a previous court of enquiry." But Mr. Tytler does not add, that it is an insufficient cause, if the court of enquiry did not give an opinion, and he might have gone on to state, that no grand juror, having ignored a bill against a prisoner, can be a member of a jury on the trial of *that prisoner for the same charge*; and that, under all possible circumstances, it is a good cause of challenge that "a juror has formerly been a juror in the same cause."⁷ Thus far the custom of civil courts tends to confirm the custom of courts martial here contended for, — that the having been a member of a court of enquiry is a sufficient objection, and this, whether

(5) Kennedy on General Courts Martial, p. 20.

(6) Page 223.

(7) 3 Blackstone, 363. — See before, § 504.

an opinion shall have been given or not. The reason seems to be found in the possibility of the jurors being led to a premature opinion from incomplete and *ex parte* evidence. But though the custom of courts of civil judicature must have great weight in justifying the customs of courts martial, and although the rules of evidence in courts of common law ought to be admitted by courts martial as being the *law* of evidence, yet, in matters relating to the constitution of the court and to the ordering of its proceedings, courts martial must be guided by their own peculiar customs, which, when they differ from the ordinary forms in courts of common law, may generally be traced to have originated in peculiar circumstances incidental or inseparably attaching to courts martial.

having been a member on a collateral trial, not in itself a valid cause of challenge.

514-9. But even if the analogous custom of common law courts were admitted as paramount authority, it is still to be shown that such analogy can be established as will support the position, that "having been a member of a general court martial in which the circumstances about to be investigated have been discussed either principally, collaterally or incidentally," is a sufficient objection. We learn from Hawkins that "It hath been adjudged to be no good cause of challenge, that the juror hath found others guilty on the same indictment, for the indictment is, in the judgment of the law, several against each defendant, for every one must be convicted by particular evidence against himself."⁸ We read also, that where several are indicted jointly, but put separately on their trials, a conviction of one by a jury is no cause of challenge to the other prisoners, for the crime of each is several.⁹ But — quite apart from any weight which may be derived from these rules of common law courts, — it may be confidently asserted that nothing is more common or better established by custom, than for the same court martial, or rather, as they are resworn, courts martial composed of the same officers, to investigate charges, not only collateral, but rising out of the same facts, and even identical. Were it known and invariably admitted, that challenges to officers so circumstanced were allowed, they would, it is believed, be often resorted to to the prejudice of the service and to defeat the ends of

(8) 2 Hawkins, 589.

(9) Kelyng, 9.

justice. In many situations courts martial are with difficulty assembled, and it would be often the next thing to impossible, if not absolutely impossible, to furnish a different set of officers on collateral trials; and hence it is, that arbitrary challenges — “a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous,”¹⁰ — cannot be permitted before courts martial.

(10) 4 Blackstone, 353.

CHAPTER XIV.

FORMATION, ADJOURNMENT, AND DISSOLUTION OF
THE COURT.

520. If no challenges have been made, or after all have been disposed of, the court must first be duly formed by being sworn in before proceeding with the trial. The prisoner, prosecutor, (but not necessarily the witnesses) being present, the judge advocate proceeds to administer the oaths prescribed by the articles of war (§ 440), to the president first, by himself, as a mark of respect, and subsequently to the members collectively, or to as many of them as may conveniently together hold the book. The president then administers to the judge advocate the oath of secrecy.

Formation
of the court.

Swearing of
the court.

Oath adminis-
tered, first to
president;
to members
collectively;
to judge
advocate.

521. In all cases in which more prisoners than one are arraigned upon different charges, and tried by the same court martial, it is directed that the court be resworn at the commencement of each trial, and that the proceedings should be made out separately. The contrary custom, as to reswearing the court, prevailed before the appearance of the order to this effect, though the terms of the adjuration, "You shall well and truly try and determine according to *the evidence in the matter now* before you," would seem to have always required the repetition of this oath in each separate case.

Court resworn
on the trial of
each prisoner.

522. A court martial, once constituted by competent authority, continues in existence till dissolved by the same superior authority. If, when charged to try a prisoner, it has proceeded with the arraignment, it cannot be dissolved without proceeding to judgment; except in case of the death or protracted illness of members, reducing it below the legal number. The illness of the prisoner, if it promise

Court exists
till dissolved;

to suspend the proceedings of the court, to the serious prejudice of the service, may also justify its dissolution, the prisoner being thereby exposed to future trial. Should the death of the prisoner put a stop to the trial, the fact must be established by evidence, and recorded prior to the final adjournment of the court.

time of
proceeding.

523. No proceedings can take place but between the hours of eight in the morning and four in the afternoon, or in the East Indies, between six in the morning and four in the afternoon, except in cases which require immediate example.² Evident necessity will in like manner justify a deviation from the well-established custom of the service by the sitting of a court martial on Sunday, Christmas-day, or Good Friday.³

Adjournments.

524. The court adjourns, from time to time, upon the order of the president; the time when the court adjourns and assembles being recorded with precision, in order that it may appear on the face of the proceedings to have been held during the appointed hours. When the duration of an adjournment is dependent on circumstances, and the court cannot fix the day, it is re-assembled by a notification to that effect in orders, or by notice to each member from the officiating judge advocate.

Liability of
members to
other duty,
during,

but not to
embark, or
go away
on leave,

except in
special cases.

525. When, from peculiar circumstances, it is probable that a considerable time may elapse before the sentence of a general court martial is made known, the members are liable to return and do duty with their respective corps, at the discretion of the general officer commanding; but they are on no account to quit the district or station where the court martial is held without special authority for that purpose, until the proceedings of the court are finally disposed of. It was pointed out in former regulations, that in case of any pressing necessity, a reference should be made, if at home, through the adjutant general, or, if on foreign stations, to the general officer commanding, before the members are permitted to go beyond the reach of a call for the re-assembling of the court.⁴

(2) Art. War, 163.

(3) In the case of a general court martial the royal warrant (§ 464 [1]) authorizes the payment of the usual

allowances on the intervening Sundays during the sitting of the court.

(4) Queen's Reg. (1859), p. 2; Gen. Reg. (1837), p. 247.

526. On general courts martial at all times, and on minor courts martial occasionally, it is desirable that a number, exceeding that legally necessary, should be sworn in, to guard against the inconvenience which might otherwise arise from the sickness or death of a member. If, by the absence of a member, the court be reduced below the legal number, it necessarily adjourns: if the legal number remain, the trial is proceeded with. In either case the absence, with the cause, is duly recorded. If it be the sickness of a member, proved by the evidence of a medical officer, the court may adjourn, either from time to time, or leaving the time of meeting to be announced, as above mentioned (§ 524); but if the number be reduced by death below the minimum, the court being from that moment dissolved, so far as the cause under trial is concerned, adjourns *sine die*, and the circumstance is reported to the authority by which the court is convened.

Desirable to swear more than least legal number.

Court reduced below the legal number, by sickness, may adjourn;

by death, is dissolved:

527. On the court being reduced below the legal minimum by death, or if the illness of any one of its number be so serious as to render necessary such an adjournment as may prove inconvenient to the service, it is competent to the authority which convened it to declare the court dissolved, and, provided it has not proceeded so far as to give judgment, to assemble another court for the trial of the prisoner. The mutiny act only provides against second trials of persons "acquitted or convicted." Such of the officers, who composed the former court, as remain available, may be appointed to form part of the new one, but they must, with the additional members, be subject to challenge. The whole of the proceedings, the swearing of the court, the swearing and examination of witnesses, &c., must be *de novo*. Such course, not only accords with the ordinary proceedings of courts martial and the express opinion of the late able judge advocate, Mr. Manners Sutton,⁵ but is in strict conformity

judgment not being pronounced.

a new trial may be ordered, but

all proceedings must be *de novo*.

(5) The opinion of Mr. Manners Sutton, referred to, was given in a case where an officer had been placed on his trial and the prosecution far proceeded with, when the illness of a member, by reducing the court below the legal number, interrupted the proceedings; and the delay, occasioned

by referring to the judge advocate general, was productive of an arrangement of the affair, in consequence of which, the prisoner was released from arrest and returned to his duty; it is for this reason that names and dates are not given.

with the custom of the superior courts of law, on the sudden illness of a juror.⁶

528. It has however been held, that new members may be *added* to a court martial, if "such persons hear or be well informed of the evidence given before their attendance;"⁷ and others again have asserted, that such proceeding would be correct, if assented to by the prisoner; but as it is directly contrary to common law to admit a new juror, and opposed to the custom of courts martial to admit a new member to take his seat during the progress of a trial, (as much so and for the same reasons as it would be to permit an original member, who had been absent during the examination of a witness, to resume his,) there can be no sufficient reason for admitting even the consent of the prisoner, to induce such a deviation from the correct path. Any other irregularity, and innovations of every kind, might, if consented to by the parties before the court, upon the same principle, be justified. The court is sworn to abide by certain fixed rules, not to arbitrate between parties on any terms to which *they* may agree, and, it is conceived, ought not to permit the concurrence of the prisoner, or parties to the trial, to influence any proceeding which may affect its constitution. The utmost extent to which the *consent* of the parties might operate, should apply only to any laxity or modification in the admission of evidence. If these principles be admitted, it must be granted, that on the addition of a new member, the court ought invariably to be resworn and to be again subject to challenge; but, when the court is duly constituted, if, to save time, the prisoner think fit, and the prosecutor do not object, there can then be no objection to admit after each witness has been again sworn, the reading over to him, and the entering on the proceedings of his previously recorded testimony, with any alteration he may desire, the witness being himself also subject to examination by the court and to be again examined by the parties before it.

Consent of parties not to affect the constitution of court;

may influence the admission of evidence.

Casualty to president; the next senior member may be appointed.

529. Should the court be deprived of the president, the convening authority is competent to appoint the next senior member to that office (if he be eligible under the provisions

(6) Scaldert's case; 2 Leach, 707.

(7) Opinion of the king's advocate and solicitor of the admiralty, Messrs.

G. Paul and W. Strahan.—1 M^r Arthur (3rd Edit. 1806), Appendix xv; but omitted in the 4th Edition (1813).

of the articles of war,) provided the members still remaining be legally sufficient. In such case, the proceedings would continue as though no interruption had occurred, the warrant or order appointing the new president being read and entered.

530. As it is essentially necessary that the examination of witnesses should take place in the presence of all the members of the court, and as, in fact, no act performed by a part of the court can be legal, the unavoidable absence of any member, by sickness or otherwise, at any period, necessarily prevents his resuming his seat.⁸ A failure in attention to this custom, which has ever prevailed, so far as the author can ascertain, in the british army, was strongly animadverted upon by General Viscount Combermere, in a general order, dated Simla, 17th September, 1828, on the proceedings of a general court martial held at Dinapore, for the trial of Lieutenant E. Reily, of the 13th light infantry: "It appears that, on the court assembling on the sixth day, one of the members was taken ill and obliged to withdraw; a sufficient number remaining, the court proceeded in the hearing of evidence for the defence. On the next day of assembling, the member who had withdrawn was allowed to resume his seat. This proceeding is so directly at variance with the practice of courts martial and the principles of justice, that it may be held to affect the legality of the judgment of the court." His lordship, after commenting on the finding, continues,—"The irregularity, before observed, has rendered nugatory the sentence of the court martial."

Absence of member, during reception of evidence, prevents his return.

531. It can scarcely be necessary to remark, that the occasional withdrawing of a member for any time, however limited, must suspend the examination of a witness; that, which is in itself unjust and irregular, must be so, if tolerated in any degree.

532. The absence of the judge advocate, who may have been sworn in at the commencement of the proceedings, will not invalidate the proceedings of a general court martial. A substitute may be appointed by the judge advocate general, or by the officer convening the court, where the warrant

Judge advocate may be relieved in the course of trial,

(8) See a remark of his majesty in the general order, 20th December, 1806, publishing the sentence on Quarter-master Heady, 3rd dragoon guards.—§ 617.

includes the power to appoint a judge advocate. The person appointed to officiate must obviously be sworn, and it must be entered on the face of the proceedings, that his warrant has been read in court. The reasons which debar the return of a member, absent during the reception of evidence, do not apply to the judge advocate; he may resume his duties at any moment.

and resume his duties.

Trial may be put off,

on score of absent witness ;

533. Application to delay the assembling of the court, from the absence or indisposition of witnesses, the illness of the parties, or other cause, should be made, when practicable, to the convening authority; but application to put off or suspend the trial, may be urged with a court martial, subsequent to the swearing of the members. It may be supported by affidavit, and to prevail on the score of the absence of the witness, the court must be satisfied that the testimony proposed to be offered is material, and that without it,¹ the applicant cannot have substantial justice. The points, therefore, which each witness is intended to prove, must be set forth in the application, and it must also be shown that the absence of the witness is not attributable to any neglect of the applicant. A precise period of delay must be prayed for, and it must be made appear that there is reasonable expectation of procuring the attendance of the witness by the stated time; ² or, if the absence of a witness be attributed to his illness, a surgeon, by *vivâ voce* testimony, or by affidavit, must state the inability of the witness to attend the court, the nature of his disease, and the time which will probably elapse before the witness may be able to give his testimony.

sickness of prisoner ;

which, in certain cases, may justify dissolution of the court,

534. The court must obviously be adjourned at any period of its proceedings, prior to the final close of the prosecution and defence, on satisfactory proof by a medical officer that the prisoner is in such a state that actual danger would arise from his attendance in court; and where the prisoner is so ill as to render it probable that his inability to attend the court will be of such continuance as to operate to the inconvenience

(1) "I take it not only on precedent, but in common justice, a greater latitude has always been given in the procuring witnesses material for the defence, than those thought material for the prosecution."—*The judge advocate general (Mr. Mannors Sutton)*,

Col. Quentin's Trial, p. 35.

(2) "I do not know of any instance of the court being adjourned to an indefinite period, for the attendance of a witness, whose attendance they could not compel."—*Mr. Mannors Sutton*, *ibid.*

of the service, either by the retention of the members of the courts from their regiments, or from other cause, the court may be dissolved by the authority convening it, though the prisoner may have been arraigned and the trial have been proceeded with, and the prisoner, on recovery, would be amenable to be tried by another court martial.³

prisoner being
amenable to
subsequent
arraignment:

535. The illness of the prosecutor would, in few cases, justify the suspension of the trial, excepting perhaps for a very limited period. All prosecutions before courts martial are considered at the suit of the crown, and another officer might be required to perform the duties attaching to the prosecution.

Illness of
prosecutor.

536-49. With reference to the dissolution of courts martial, and to the mode of keeping the roster for court martial duty, it may be observed that the Queen's regulations direct, that a court martial, the members of which shall have been assembled and sworn, is to be reckoned a duty, though they shall have been dismissed without trying any person.⁴

A court
martial once
sworn, counts
as a tour of
duty.

(3) "This is analogous to the custom in courts of civil judicature, where, if a prisoner indicted for felony, with whom the jury is charged, be by sudden illness, during the trial, rendered incapable of remaining at the

bar, the jury may be discharged from the trial of that indictment, and the prisoner on his recovery be tried before another jury."—2 *Leach*, p. 619.

(4) Queen's Reg. p. 2, par. 6.

CHAPTER XV.

OF THE TRIAL AND ITS INCIDENTS.

Arraignment.

Charges read,

Prisoner
arraigned.Court, taking
objection to
charge, adjourns
and reports,having
authority to
amend the
form or
substance of
the charge.

PLEA.

Guilty, or
not guilty:

none offered.

Special in bar.

550. THE court having been sworn, the charge is read, in open court, to the prisoner, whom the president, or judge advocate, at his desire, proceeds to arraign, by addressing him by his rank and name¹, as specified in the charge, and to the following effect: 'Are you guilty or not guilty of the charge, (or charges,) which you have now heard read?' Where two or more prisoners are tried, each is separately arraigned in like form.

551. Courts martial objecting (§ 457) to a charge, or the terms of it, before the arraignment of the prisoner, must defer calling on him to plead, and adjourn, reporting the proceeding through the president to the officer by whom the court may have been convened. With the exception of mere clerical corrections (§ 389) the court has no authority to proceed with the trial on altered charges, until their amendment has been sanctioned by the authority convening the court.

552. Whatever plea a prisoner may make, it is recorded on the proceedings: he either pleads guilty or not guilty;—the plea must be express, simple and unqualified, as no exculpatory matter can, in this stage, be received; no *special* justification can be put in by way of plea; it would be to anticipate the defence:—or he stands mute, that is, makes no answer at all, or answers foreign to the purpose:—or he may offer certain pleas in bar of trial.²

(1) It was formerly the etiquette to address prisoners before military courts martial, by the appellation *prisoner*; and the custom is still, it is believed, rigidly retained in the navy.

(2) As to objections to the charge, in the nature of pleas in abatement,

see before, § 389.

There is another description of plea (distinguished, in civil courts, as a demurrer); it admits the truth of the facts charged; but issue is joined upon some point of law, by which it may be insisted that the fact, as stated, is no mutiny, no

553. In every case in which a prisoner pleads guilty, the court martial is enjoined, notwithstanding, to receive, and to report in their proceedings, such evidence as may afford a full knowledge of the circumstances; it being essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect.³ Formerly, if a prisoner pleaded guilty, the court, adopting the custom of common law courts, proceeded at once to pass sentence; this happened in the case of Lieutenant Kersteman, of the royal artillery, who was tried at Rosendaal, in 1814.⁴

554. A plea of guilty has been held by the highest official authority neither to preclude the production on the part of the prisoner of evidence as to *fact* as well as *character*, nor to be a bar to his addressing the court on his defence in extenuation of the offence or in mitigation of punishment. Upon the same principle, although an impression to the contrary has not been infrequent, a prisoner pleading guilty is not debarred from cross-examining the witnesses for the prosecution: a prisoner may plead guilty to the charge generally, and yet desire to alleviate the bearing of particular parts of the evidence brought against him, or to place his conduct, connected with such evidence, in a different point of view from that in which the examination in chief may have left it, and justice requires that he should enjoy this privilege: besides which, a cross-examination may essentially tend to an elucidation of facts, and a knowledge of circumstances; to ascertain which, for the information of the approving authority, is the express object of proceeding with the trial.

Prisoner pleading guilty, may make a defence and cross-examine.

555. A prisoner, who stands mute, does so, either obstinately, or by visitation of God. In either case, the court would act in the spirit of the regulation, above quoted (§ 553), by entering a plea of "not guilty," and proceeding with the trial. Before this order, courts martial, on a prisoner's standing obstinately mute or refusing to plead, proceeded, as

Standing mute.

disobedience of orders, no conduct unbecoming the character of an officer and a gentleman. This plea, in so far as it concerns the proceedings of courts martial, need scarcely be adverted to, as it would not be ad-

mitted, and similar advantages may be taken on a plea of not guilty.

(3) Queen's Reg. p. 222.

(4) G. O. No. 333.—See also G. O. No. 338.

on a plea of guilt, to pass sentence. The trial of assistant surgeon Harrison of the 17th regiment of foot, at Ghazepoor, in 1816, supplies an instance: the court, in passing sentence, specially declared, that they had no alternative, considering the prisoner's determined and repeated refusal to plead, but to pronounce him guilty.⁵ This custom of courts martial was grounded on that of common law courts: but it is now declared by statute, that if a prisoner refuse to plead, the court may, if it shall so think fit, order a plea of not guilty to be entered.⁶ A court martial, therefore, in proceeding with the trial of a prisoner refusing to plead, would not only act in the spirit of the order as to pleas of guilt, but in conformity with the existing practice of common law courts.⁷

Pleas in bar
of trial;

556. Pleas in bar of trial may be either—To the jurisdiction of the court, or—Special pleas in bar, as they are termed, in which the prisoner sets before the court a reason why he should not be called on to answer to the charge.

If the plea in
bar be valid,
the court
adjourns.

557. If the special plea in bar of trial be plausible, it is presumed, in the absence of an authoritative precedent, that evidence, when necessary, would be heard to the point; and if, on deliberation, the plea were found valid, the fact being recorded, the court would adjourn, and the president submit the proceedings to the officer, by whose order the court was convened.

Similar matter
may be offered
in his defence.

558. It is held that a prisoner before a court martial, who should omit to offer these pleas on arraignment, is not deprived of the advantages, he might have derived under them, by the want of form, which the court may remedy by their sentence.

Plea to the
jurisdiction:
person:

559. A prisoner, pleading to the jurisdiction, may aver that he is no soldier, or not amenable to a court martial;—or a soldier, brought before an inferior court martial for a crime declared by the articles of war to be cognizable by a court martial of superior jurisdiction, without authority having been extended to the inferior court;—or, arraigned by a court not legally constituted, either as to the authority

offence.

(5) G. O. No. 396.

(6) 7 & 8 Geo. 4, c. 28, s. 2.

(7) Should a prisoner stand mute by the visitation of God, though the court proceed to trial as if he had pleaded not guilty, yet it is a point

undetermined, whether judgment of death can be given against one who had never pleaded, and who can say nothing in arrest of judgment.—4 Blackstone, 524.

by which it assembled, or as to the number and rank of its members;—may for these, and similar causes, except to the jurisdiction of a court martial. It may also be pleaded in bar of trial, (or an objection may be taken to the warrant, which is the same in effect) that the offence charged has taken place more than three years before the issuing of the warrant for trial, unless the person accused, by reason of his having absented himself, or of some other manifest impediment, may not have been amenable to justice; in which case, the plea would be valid only, if time exceeding two years had elapsed from the period when the impediment may have ceased.¹ It appears from the remarks of the judge advocate and the proceedings of the court martial on Lieutenant-colonel George Johnston, of the 102d regiment, that, though the facts in issue should be charged to have happened more than three years prior to the date of the warrant for the assembling of the court martial, yet that it is not the province of the court, *no objection being taken to the warrant*, to enquire into the cause of the impediment in the outset, and before the prosecutor proceeds with the opening address. It would be to presume the illegality of the warrant; whereas, the court should assume, that manifest impediment to earlier trial did exist, and leave the facts to be developed by witnesses in the ordinary course.²

Time charged beyond the retrospection of court.

560. A former acquittal or conviction of the same offence is obviously a valid bar to trial;³ nor is there any exception as formerly, officers who have been acquitted or convicted by the civil magistrate being no longer triable by a court martial.⁴

SPECIAL PLEAS.

Former trial for the same offence.

561. Analogous to the defence of a former conviction is the plea, that the prisoner has been previously punished for the same offence. This had always been allowed at courts martial, as respects both officers and soldiers, and it was expressly provided by the mutiny act, so long as it continued to specify the powers of commanding officers, (which, since 1860, have been conferred by the articles of war,⁵) that in the case of a soldier who had been guilty of any offence,

Previous punishment for offence charged.

or, in case of a soldier,

(1) Mut. Act, sec. 97.

(2) Printed Trial, p. 11.

(3) Mut. Act, secs. 14, 37. See further, § 726.

(4) Mut. Act, sec. 37. See note § 33.

(5) Art. War, 54.

order of
punishment,

which the commanding officer may not have thought necessary to bring before a court martial, and for which he had awarded any punishment he had authority to inflict, "that such soldier shall not be liable to be afterwards tried by a court martial for any offence for which he shall have been so punished, *ordered* to suffer imprisonment, punishment, or forfeiture." The cases where a soldier has his pay interfered with (§ 367), and has a right to appeal to a court martial, instead of submitting to the summary award of the commanding officer, are an obvious exception.

unless he
appeal to a
court martial.

Previous
punishment
for offence
charged;

562. On the trial of Captain G. J. Hallilay, of the 10th regiment of foot, the court, the proceedings of which were approved and confirmed by His Majesty, expressly "declined to proceed upon the investigation" of the fifth charge, as it appeared that the prisoner had already been "severely punished, by having been put into, and kept in, arrest, for the offence stated and alleged against him in that charge, and by having been severely reprimanded in orders and afterwards released from arrest." The court was induced to express its concern in being obliged to notice the conduct of Lieutenant-colonel Newman, in having "preferred the fifth charge against the prisoner, when he, Lieutenant-colonel Newman, must have been conscious that he had before punished the prisoner, for the offence in such charge alleged against him, by a public censure and admonition inserted in the orders of the battalion."⁶

a court martial
has declined
to enter on the
investigation,

or to award
further pun-
ishment.

563. Assistant surgeon G. Ferguson, of the 71st regiment, was tried at Edinburgh Castle, in March, 1835, on four charges, and was found guilty of the three first: the court remarked, "it having appeared in evidence that the prisoner has suffered punishment by a reprimand, under arrest at Bermuda, by competent authority, on these three charges, the court do not feel themselves warranted in awarding further punishment for the same." The sentence was approved and confirmed by His Majesty. Had the prisoner offered, in bar of trial, proof of a reprimand under arrest, by competent authority on these charges, it is possible that the court might have declined to enter on their investigation, as in the case of Captain Hallilay.

(6) G. O. Horse Guards, 1st Sept., 1808.

564. A pardon may be pleaded in bar of trial ; if full, it at once destroys the end and purpose of the charge, by remitting that punishment, to inflict which the prosecution is set on foot ; if conditional, the performance of the condition must be shown ; thus a soldier arraigned for desertion may plead a general pardon offered by His Majesty, and prove that he surrendered himself within the stipulated period.

Pardon, if full, sufficient ;

if conditional, condition must be performed.

565. At a general court martial of which Major-general Sir Colquhoun Grant, K.C.B., was president, private ———, of the — Hussars, was arraigned ' for desertion.' The court are of opinion that the forgiveness of the prisoner by his commanding officer of this same crime of desertion now preferred against him, and the prisoner having been ordered to do his duty as a soldier in the regiment subsequently to such forgiveness, does amount to a pardon of the delinquency charged against him ; which opinion has been confirmed by the field marshal. Private ——— is, therefore, to be released from his confinement, and to return to his duty.⁷

Release by commanding officer amounts to pardon,

by the custom of service ;

566. The Queen's regulations now also point out that "the act of placing arms in the hands of a prisoner for the purpose of attending parade or performing any duty, absolves him from trial or punishment for the offence which he has committed."⁸

enforced by regulation.

567. It must however be observed that this principle applies only in those cases where an offence has been advisedly overlooked or forgiven by competent authority. These pleas do not apply where a prisoner has been released under a wrong impression of the extent of his misconduct. It was laid down at the judge advocate general's office, with reference to a case where a prisoner had been released from his arrest, that if, when the lieutenant-colonel applied for his release, he had a full knowledge of all the circumstances of his misconduct and did also afterwards release him from arrest, it is to be presumed that he intended to overlook the offence, and he ought not now to be put on his trial, but if the lieutenant-colonel was not informed of the extent of his

But a prisoner liable to punishment by a court martial where fresh circumstances have appeared against him, although advisedly released by competent authority.

(7) G. O. Cambrai, 16th May, 1817. — *Col. Gurwood*, p. 505.

(8) Queen's Reg. (1859), p. 122. The fiftieth article of war provides that soldiers making confession of de-

sertion shall continue to do duty until evidence of the truth or falsehood has been obtained. § 240. See G. O. 802, § 358[8].

misconduct when he ordered his release — “such release presents no bar to his now being tried.”

Want of
specification
of charge.

568. Besides the above special pleas in bar of trial it is conceived that a prisoner, before a court martial, may plead the *entire* want of specification in the charge as to matter, or time, where time is essential to fix the identity; — as, for instance, an officer charged with scandalous conduct, or a soldier with disgraceful conduct, without any mention of facts to which the charge is meant to refer.⁹ But, though it be admitted to have full effect in preventing the trial of the prisoner upon the charge objected to, it cannot have the effect of barring his trial upon any valid charge wherein facts may be set forth. The prisoner's objection to the charge, if admitted, would avail upon the ground that the charge was couched in terms so vague as not to point to any specific crime, to meet which he might direct his attention. If then he were arraigned upon an amended charge, and by virtue of a different warrant or order, he could not consistently plead that he had been previously arraigned for the same offence; nor, if he did, would the plea be of any avail. It may be for this reason, that the objection of want of specification in charges is usually reserved for the defence, instead of being pleaded on arraignment, since the course of the prosecution would serve to identify the facts to which the charge was meant to apply, and the finding of the court would have the effect of exempting the prisoner from a second trial on charges built on those facts.¹ There can be no doubt but that, where the court has unadvisedly entered on the investigation of defective charges, the total want of specification may be urged as a legitimate reason for declining all defence, and would render the proceedings nugatory or rather innocuous to the prisoner, since no sentence of punishment, under such circumstances, could be enforced.² With reference however to these technical objections, which are only admitted by courts martial when they appear essen-

(9) See the case of Captain Peshall and Lieutenant-colonel Austin, § 457.

(1) Mut. Act. sec. 14.

(2) See § 413. In the ordinary courts of criminal jurisdiction, in cases of objection to the indictment, on the grounds of want of specification or

precision, the courts refuse to quash the indictment, after the prisoner had pleaded and the jury was charged to try it, on account of a defect in form, but put him on his defence and entered a verdict of acquittal.—*R. v. Frith*, 1 Leach, 10.

tial to abstract justice, it may be observed, that the period at which an officer would most likely urge objections to the want of specification in a charge would be on the copy being furnished him, and through the medium of the judge advocate. If his honour were at all implicated, he would scarcely postpone an objection to the charge to a time when it may operate to the prevention of a full enquiry; nor, if he had pleaded to a charge, would he fail to embrace the opportunity, as the only possible one which could be afforded, of placing his character in a desirable point of view.

When the copy is furnished, is the proper period to urge objections to charge.

Prosecution.

569. The prisoner having been arraigned, and a plea of *guilty* or *not guilty* recorded, the trial proceeds: in like manner, where a plea in bar of trial has not been allowed, the trial proceeds as if no such plea had been offered. The president or judge advocate cautions all witnesses on the trial to withdraw, and to return to court only on being called, as "it is a general rule to preclude witnesses on both sides from being present at the time of the examination of other witnesses."³

Prosecution.

Witnesses withdraw.

570. The prosecutor then proceeds to call the witnesses for the prosecution, or — the usual course in all more important or difficult cases — opens the case by such statement and view of the evidence as he may deem expedient; nor is he to be restricted in it, except he introduce matter disrespectful to the court, foreign to the charges, or unless he insinuate imputations not implied by them: "no reproachful words are to be used to prisoners."⁴ This address may be either *vivâ voce* or written; the prosecutor generally reads a written address. The address is in every case recorded in full on the proceedings, and although it is the duty of the court at once to check any attempt on the part of a prosecutor, to enter upon matters not put in issue by the charge and which the court have no authority to investigate, nor the prisoner an opportunity of rebutting, the court is not justified in allowing the prosecutor to withdraw any part of the address which he has actually delivered, and is responsible

prosecutor opens the case.

if by an address, it is entered in the proceedings without correction or erasure.

(3) Judge advocate general Ryder; Lieut.-Gen. Whitelock's trial, p. 2.

(4) Art. War, 142.

that it is entered on the proceedings without any omission, up to that point where they interposed.

He may subsequently give evidence, as the first witness for the prosecution;

571. The prosecutor, if he be himself a witness for the prosecution, is sworn *after* any speech or observation, which he may have addressed to the court, and, having given evidence as to such facts as may come within his knowledge, is cross-examined by the prisoner, and questioned, if necessary, by the court. The prosecutor must not be permitted to depose generally to the facts embodied in his address,⁵ but must detail in evidence, as any other witness, all such facts as he may desire to substantiate by his own testimony. He then proceeds to the examination of witnesses, and to the proof and reading of any written evidence he may have to bring forward, and is usually permitted to adduce his evidence in the order he may think fit, either as bearing on the charges collectively, or on each charge separately; but the court has occasionally interfered by classifying the charges as to time or circumstances, directing that the evidence shall, in the first place, be produced, and witnesses examined to certain counts, or as to the occurrence of events up to a certain period;⁶ and subsequently upon the other divisions of the charge.

examines witnesses, &c.

Custom of allowing address of prosecutor justified as favourable to prisoner.

572. The custom of allowing prosecutors; who are themselves witnesses for the prosecution, to address courts martial is opposed to the practice of civil courts of judicature;⁷ it may, however, be observed, that though at first sight it appears more to accord with ordinary impressions as to justice and equity that a witness should be confined to facts, leaving the deduction therefrom to those whose duty it may be to judge the question; yet, on a farther view, it may be conceded, that the custom of courts martial, in permitting a prosecutor, who may give himself evidence, to address the court, may promote the ends of truth and cannot militate

(5) There have not been wanting officers, who have recommended a resort to this expedient, but it would appear at variance with the articles of war, and equally so with the custom of the service. "All persons who give evidence before any court martial are to be examined upon oath, in the following words: '*The evidence which you shall give before this court shall be the truth, the whole truth, and nothing*

but the truth. So help you God.' (Art. War, 154.) Witnesses are to be examined on oath, not to be examined first, and to swear to their examinations after. The witness swears that the evidence he *shall* give, not that he *has given*, shall be the truth.

(6) Lieut.-Gen. Whitelock's trial, p. 11.

(7) *Bex v. Brice*, 1 Ch. Rep. 352.

against the prisoner; since the deportment of the prosecutor, and the manner in which he conducts the prosecution, may markedly tend to develop the feelings by which he may be actuated, and thereby fix the degree of confidence to be placed in his testimony; and, inasmuch as it may affect the credibility of the prosecutor, in an equal degree will it benefit the prisoner.

573. The examination of witnesses⁷ is invariably in the presence of each member of the court: it has been well remarked, that "even the countenance, looks, and gestures of a witness, add to, or take away from, the weight of his testimony." The witnesses, having been sworn or having made a solemn affirmation, are sometimes directed to state what they know relative to the charges before the court; but the ordinary and, perhaps, the preferable practice, is to conduct the examination⁷ by question and answer: in either case, the judge advocate takes down the evidence, as nearly as possible, in the words of the witness, and records it on the proceedings, in the order in which it is received by the court.⁸

Witnesses
examined,

on oath,

sometimes by
narration,

usually by
interrogation;

evidence
recorded;

574. A question, whether originated by the prosecutor, prisoner, or by a member of the court, is reduced to writing, and then passed to the president; if approved by him, it is entered by the judge advocate on the proceedings, read aloud, and, no objection being made to it by the opposite party or the court, addressed to the witness. Should the president object to the question, he returns it for consideration to the person proposing it; if persisted in by such person, it is entered upon the proceedings and thereupon, (as also if a question, on being read out, be objected to by a party before the court, by a member, or by the witness under examination,) the court, after any observations which may be offered by the parties concerned, is cleared and proceeds to determine by a majority of votes, the president having a casting vote, whether it shall be put or be rejected. Both prosecutor and prisoner are at liberty to request that their object in proposing, or reasons for objecting to a question, which they are at liberty to lay before the court

questions
reduced to
writing, and
submitted to
president.

Objection to
particular
question.

(7) See additional remarks as to the examination of witnesses, in chapter xxii.

(8) Queen's Reg. p. 222.

Objection to questions;

in writing, may be entered on the proceedings, and the court, within moderate limits, usually complies with their request.

by court ;

575. Objections to a question put by the court obviously do not stand upon the same footing, but, upon good reason shown, the court may withdraw or modify the question. A question put by an individual member must in some sense be considered as a question from the court ; yet, where the collective opinion of the court has not been expressed, as to the propriety of any given question, a party before it is entitled to such aggregate opinion.

by member ;

Question entered, not to be expunged.

576. It has been remarked, that every question to a witness, proposed by either prisoner or prosecutor, unless palpably illegal and improper and at once withdrawn by them, is in the first instance entered before being read aloud ; when once entered it cannot be expunged. In those cases where the court exercises its authority in refusing to allow a question to be put to the witness, the question so rejected still appears on the proceedings, accompanied by a statement of the objection to it, in order that it might be known to the confirming authority whether the court has exercised its authority according to law.

Cross-examination by prisoner :

577. The examination in chief of each particular witness being ended, the cross-examination usually follows, though it is optional with the prisoner to defer his examination until the close of the prosecution and he is placed on his defence.

re-examination :

The re-examination by the prosecutor, on such points as the prisoner may have touched on, succeeds the cross-examination ; and, finally, the court put such questions as in their judgment may tend to elicit the truth. A court martial has unquestionably the right of putting questions to witnesses at any period of their examination, but this power should be employed with great discretion and much reserve. The exertion of it has sometimes proved embarrassing to the court itself. It is very seldom that a case can arise which would justify this interference with the prosecution or defence. The court and each individual member ought to reserve all questions until after the examination of a witness is finally concluded by the parties to the trial. It will frequently be found that the development of evidence in the ordinary course of examination will have anticipated the

questions by court.

necessity of questions occurring to members during its progress.

578. It is invariably the custom to read over to each witness, immediately before he leaves the court, the record of his evidence, which he is desired to correct if erroneous; and, with this view, any remark or explanation is entered on the proceedings.⁹ It would obviously be improper to read over the record to a witness, or to permit him to refer to it when under or previous to cross-examination. No erasure or obliteration is, under any circumstances, admitted, as it is essentially necessary that the authority which has to review the sentence should have the most ample means of judging, not only of any discrepancy in the statements of a witness, but of any incident which may be made the subject of remark by either party, in addressing the court. A minute might be made of the sense of the court on the matter inadvertently admitted, that members may dismiss from their consideration any impression which might have arisen, and that the confirming authority may be aware of the inconsequence of the admission.

Correction or explanation of testimony,

by addition,

not by erasure.

579. It has been stated that a list of witnesses summoned by the judge advocate, is usually furnished to the court on assembling; the prosecutor is not however bound to examine all the witnesses for the prosecution; but, if he does not, the prisoner has a right to call them. Should the prisoner, having closed his cross-examination, think proper subsequently to recall a witness for the prosecution for his defence, the witness is then subject to cross-examination by the prosecutor.

Prosecutor's witness having been cross-examined, if subsequently recalled on defence, examination is held to be in chief.

580. Although either party may have concluded his case, or the regular examination of a witness, yet, should a material question have been omitted, it is usually submitted by the party¹ to the president for the consideration of the court, who generally permit it to be put.²

Material question omitted put by court.

(9) See § 478, and "Correction by trial, 439-441.
witness," § 960.

(1) Lieutenant-General Whitelock's examination of witnesses, chap. xxii.

(2) See additional remarks as to the examination of witnesses, chap. xxii.

DEFENCE;

time allowed
for preparing.

Address may
precede or
follow the
examination
of witnesses;

or may be a
modification of
either mode.

Course of
examination
of witnesses
for defence
corresponds
with that for
prosecution.

581. The prisoner, being placed on his defence, to arrange and prepare which, subsequent to the closing of the prosecution, he may request, and in that case is usually granted, a certain time, perhaps a day or two, or more, may proceed at once to the examination of witnesses; "first to meet the charge, and secondly, to speak as to his character,"³ reserving his address to the court to the conclusion of their examination; or he may previously deliver a statement, commenting on any discrepancies in the evidence produced on the prosecution, placing his conduct, which is the cause of arraignment, in that point of view which he may deem most conducive to his exculpation, and pointing out the chain of evidence by which he proposes to establish the arguments adduced in his defence. The former mode is that usually adopted, as it is obviously more advantageous to the prisoner, since he is enabled to argue on facts and evidence actually established, instead of resting his defence on what may prove to be only hypothetical. It may not accord so exactly with the form of common law courts; but no proceeding is better established by the custom of courts martial, than to leave the time of the delivery of the prisoner's address to his option; it may either precede or follow his examination of witnesses. Indeed, a prisoner, having generally addressed the court previous to the examination of his witnesses, may, if he think fit, at the close of his defence, again offer any remarks connecting his exculpatory evidence, and contrasting it with the evidence of the prosecution, or he may open his defence by a detail of the evidence he intends to bring forward, and defer his remarks upon the prosecutor's address till after the examination of his witnesses. The prisoner having finished the examination in chief of each witness, the prosecutor immediately proceeds with his cross-examination: the prisoner re-examines to the extent allowed to the prosecutor, that is, on such points as the cross-examination may have touched on; and the court puts any questions deemed necessary.

582. The prisoner having finally closed his examination of witnesses, and selecting this period to address the court,

offers such statement or argument as he may deem conducive to weaken the force of the prosecution, by placing his conduct in the most favourable light, accounting for or palliating facts; confuting or removing any imputation as to motives; answering the arguments of the prosecutor; contrasting, comparing, and commenting on any contradictory evidence; summing up the evidence on both sides, where the result promises to favour the defence, and finally, making the deduction. Mr. Serjeant Hawkins, when alluding to the custom which prevailed in criminal courts, of debarring a prisoner from counsel, unless some points of law arise proper to be debated, makes some remarks which are most particularly applicable to prisoners before courts martial; and the duties of the court, as there laid down, are equally incumbent on courts martial. He says: "This indeed, (the refusing counsel in treason and felonies,) many have complained of as very unreasonable; yet, if it be considered, that, generally, every one of common understanding may as properly speak to a matter of fact, as if he were the best lawyer; and that it requires no manner of skill to make a plain and honest defence, which, in cases of this kind, is always the best; the simplicity and innocence, artless and ingenuous behaviour of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own. And if it be further considered, that it is the duty of the court to be indifferent between the King and prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue, there seems no great reason to fear but that, generally speaking, the innocent, for whose safety alone the law is concerned, have rather an advantage than prejudice in having their court their only counsel. Whereas, on the other side, the very speech, gesture, and countenance, and manner of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of others speaking for them."⁴

Advantages
arising from
prisoners
defending
themselves,

and duties of the
court in respect
to them.

Reading of
address by
friend of
prisoner.

583. It occasionally happens that on presenting to the court a written address, the prisoner is unequal to the task of reading it, from indisposition or nervous excitement. On such occasions the judge advocate is sometimes requested to read it; but, as the impression which might be anticipated to arise from it may, in the judgment of the prisoner, be affected more or less by the manner of its delivery, courts martial generally concede to the accused the indulgence of permitting it to be read by any friend named by him, and particularly if that friend be a military man. On the trial of Lieutenant-General Whitelock his counsel was not permitted to read the defence, as being contrary to precedent: but the general was informed that any military friend, or any near connection who did *not attend to assist him professionally*, might read it for him.⁵ More recently on the trial of Lieutenant Hyder, of the 10th hussars, at Leeds, in 1845, it was decided that, in conformity with the law and practice of courts martial, the court would allow of any military friend or any civilian, provided he were not his professional adviser, to read his defence.⁶ Indeed no point would seem better established in the practice of courts martial than the custom of resisting this attempt of counsel to *address* them; ⁷ although some years since deviations from the established usage (but, it is believed, not in any way sanctioned by authority) were allowed at several courts martial, the prisoner's address having been *read* by the barristers and attorneys employed professionally to conduct the defence.

Greatest
license
permitted in
the defence,
compatible
with dignity
of court.

584. The utmost liberty consistent with the interest of parties not before the court, and with the respect due to the court itself, should, at all times, be allowed a prisoner. As he has an undoubted right to impeach, by evidence, the character of the witnesses brought against him, so is he justified in contrasting and remarking on their testimony,

(5) Printed Trial, p. 763.

(6) Printed Trial, p. 106. The prisoner on this occasion strongly urged the court to grant this permission to the well-known Mr. Warren, whom he had retained. The president however adhered to the decision he had expressed, but added, that it occasioned much disappointment to the members of the court not to hear

his counsel read his defence. Lieutenant Hyder then referred to a case where a court martial had permitted the prisoner to have the assistance of counsel in reading his defence, but, the court having been cleared for deliberation, the president's decision was reiterated.—Printed Trial, p. 107.

(7) See before, § 471.

and on the motives by which they or the prosecutor may appear to have been influenced. All coarse and insulting language is, however, to be avoided; nor ought invective ever to be indulged in: the most pointed defence may be couched in the most refined language. The court will prevent a prisoner from adverting to parties not before the court, or only alluded to in evidence, further than may be actually necessary to his own exculpation. Mr. Tytler⁸ has justly remarked on this subject; "It may sometimes happen that the party accused may find it absolutely necessary, in defence of himself, to throw blame, and even criminality, on others who are no parties to the trial; nor can a prisoner be refused that liberty which is essential to his own justification. It is sufficient for the party aggrieved that the law can furnish ample redress against all calumnious or unjust accusations."

Third parties
to be alluded
to most
cautiously,

such course
may
sometimes be
expedient.

585. The court is bound to hear whatever defence, that is, whatever address, the accused may think fit to adopt, not being in itself contemptuous or disrespectful. "It is competent to a court to caution the prisoner as he proceeds, if they should think proper, and to state to him that, in their opinion, such a line of defence as he may be pursuing would probably not weigh with them, or operate in his favour; but to decide against hearing him state arguments which, notwithstanding such caution, he might persist in putting forward as grounds of justification or extenuation, such arguments not being illegal in themselves, is going beyond what any court would be warranted in doing."¹

Prisoner not to
be restricted in
his defence, if
respectful.

586. A prisoner in his defence may either negative the allegations contained in the charges against him;—or may admit all or some of them, and nevertheless be able to give such an account of his conduct as, when borne out by incidental circumstances proved in evidence (§ 814-5), may prove them to have been not inconsistent with his duty,—or failing this, may bring forward any matters of excuse and justification. The defence has sometimes rested exclusively upon proof of the previous punishment for the offence submitted to investigation. This and other analogous defences

Pleas in bar
of judgment.

The defence
may embody
the matter of
pleas in bar
of trial,

(8) Essay, p. 302.

(1) Letter—Judge advocate general
(Sir J. Beckett) to the officiating
judge advocate. — Lieut. Dawson's
Trial, p. 83.

or certain
other grounds
of exemption
from
punishment ;

insanity ;

madness ;

lunacy ;

insane
delusions ;

partial
delusions,

have been already mentioned when discussing the pleas in bar of trial which may be pleaded on arraignment (§ 558–568). There are also certain grounds of exemption from the censure of the law, as to which Sir William Blackstone observes :² “ All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will.” To the excuses (I–V), which may have to be considered by a court martial, it is now requisite briefly to advert.

587. (I.) Absolute insanity (like total idiocy) excuses from the guilt, and, of course, from the punishment of a crime committed during this incapacity.³ The defect of the intellectual faculties must be unequivocal and plain, not an idle frantic humour or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind :⁴ but if the accused has lucid intervals, and reason sufficient to enable him to discern right from wrong, he is answerable for what he does in those intervals. So far the law is clear and explicit, but there has been a difficulty in the cases of alleged crimes committed by persons afflicted with insane delusion in respect to one or more *particular* subjects or persons, but *not* insane in other respects. The acquittal in March, 1843, of Mc Naughten, for the murder of Mr. Drummond, having given rise to a discussion in the house of lords, certain questions were propounded to the judges, and they answered, that in the case of such persons charged with the commission of a crime (murder for example) and insanity being set up as a defence, “ if the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable.” They further stated, that, with respect to a person under an insane delusion as to existing facts—the delusion being partial and the person not being insane in other respects—committing an offence in consequence thereof, they were of opinion that “ he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real.

(2) 4 Commentaries, 20, 21.

(3) 4 Blackstone, 24.

(4) 1 Hawkins, 2.

For example," they go on to say, "if, under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."⁵

when an
excuse.

588. It may be added, that whenever insanity at the time of the commission of the offence is given in evidence, and the court martial acquit the prisoner, they should specify in their finding whether they were of opinion he was insane at that time, and whether they acquit him on account of such insanity.⁶

Acquittal on
account of
insanity must
be so specified.

589. (II.) Drunkenness is looked on by the law of England as an aggravation of the offence, rather than as an excuse for any criminal behaviour; still, unless a predisposition to commit the offence charged be apparent or to be inferred from circumstances, it requires an effort of our reasoning faculties to concur in the justness of this principle. The law of England, however, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another:⁷ "He who is guilty of any offence whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober."⁸ The spirit of this maxim pervades the decisions of courts martial, and a deviation from it was highly censured by the then commander-in-chief in India, Lord Combermere.⁹

Intoxication
no palliation of
offence.

590. (III.) As to misfortune or chance, it is held, that if an accidental mischief happen from the performance of a

Misfortune or
chance, when
an excuse.

(5) 75 Lords' Journals, 401; (19th June, 1843).

(6) "If a man, in a sound mind, commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried, for, how can he make his defence? If, after he be tried and found guilty, he lose his senses before judgment, judgment shall not be pro-

nounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."

—4 Blackst. 24.

(7) 4 Blackst. 26.

(8) 1 Hawk. 3.

(9) Trial of Lieutenant G. G. B. Lowther, 44th Regiment, 28th October, 1828.

lawful act, the party stands excused from all guilt: but if a man be in the performance of an unlawful act, such act being in its original nature wrong and mischievous, (not merely technically illegal, but morally vicious,) and a consequence ensue which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse.¹

Ignorance or
mistake, when
an excuse.

591. (IV.) Ignorance or mistake is a defect of will: when a man, intending to do a lawful act, does that which is unlawful: as if a soldier, intending to fire on the enemy, kills some of his own people; or firing by order of his officer at a target, kills a by-stander; or a man, intending to kill a thief or housebreaker, in his own house, kills one of his own family; these and such like actions are not criminal.

Mistake of
law, no
excuse.

592. A mistake as to a point of law is, in criminal charges, no sort of defence;² neither is ignorance of the military law, of the rules and regulations of the army, or other public order, which it may be the duty of military men to be informed on, admitted as an excuse for their non-observance. The maxim of Roman law is never more rigidly observed than by courts martial: *Ignorantia juris, quod quisque tenetur scire, neminem excusat.*

Compulsion or
inevitable
necessity.

593. (V.) Compulsion, or inevitable necessity, is the remaining plea which it is necessary to notice; and this it is of the more importance to advert to, as it may frequently come in question on trials by courts martial. Military law, and the common law of England, have, in this case, a shade of variance. Sir Edward Blackstone says: "Of this nature (*i. e. compulsion and inevitable necessity*) is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiae*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the

Compulsion:
civil
subjection:

(1) 4 Blackst. 26.

(2) 4 Blackst. 27.

municipal tribunal.—The sheriff who burnt Latimer and Ridley, in the bigoted days of Queen Mary, was not liable to punishment from Elizabeth for executing so horrid an office.”³

594. Military courts would be disposed to extend the exculpation, admitted by common law to arise from compulsion, when the act is performed by the obligation of civil subjection and “in obedience to laws in being,” to acts performed in consequence of the order of a military superior. For though, if death ensue from the fire of a soldier acting under the orders of his superior, the command itself being illegal, such order would be no justification of the deed in the eye of the common⁴ law; and the individual who was the instrument of death, would, with him directing the act by which it was effected, be equally guilty of murder; yet a military court would accept such necessity as a justification; the breach of law itself not being a palpable and evident dereliction of duty and discipline, or a clear and notorious outrage on all law and decorum.⁵

595. This argument embraces a most difficult and delicate question; it provokes discussion as to the phrase *lawful command*, used in the mutiny act.⁶ The Sovereign has de-

(3) 4 Blackst. 28.

(4) The civil (i.e. Roman) law does allow the compulsion of military obedience. In the case of Ensign Hugh Maxwell, who was tried before the High Court of Justiciary at Edinburgh in 1807, for the murder of a French prisoner, by ordering Private John Gow to fire, when he was on sentry at the prison at Greenlaw; the private was not put upon his trial.—Buchanan's Remarkable Trials, p. 3.

(5) On a trial, arising out of the Newtownbarry affair, at Wexford, in July, 1831, before chief justice Bushe and judge Johnstone, the following conversation is reported to have taken place.

“*Sir William Cox* (a grand juror). My Lord, I would wish to ask your lordship one question. If a military body be called out, and if the commander give the order to fire, whether those acting under his command are exempt from the consequences?

“*His Lordship*. My opinion is, that no subject of the king is bound to obey an illegal order, and if an

officer give an illegal order, those who obey him are not, in my opinion, exempt.

“*Juror*. Then, my lord, is the soldier to be the judge for himself in the case, whether he is to obey the order or not?

“*His Lordship*. I suppose so.

“*Juror*. Then this being so, the circumstance will be received below in mitigation.

“*His Lordship*. I have nothing to do with that.

“The jury on this retired.”

This remark of the learned judge caused much discussion amongst military men; but there appears nothing new in the opinion; there can be no doubt of its being the law of England. No alteration has been made in this respect in the text of this work. *Author*, 1835.

(6) “If any person subject to this act . . . shall disobey any lawful command of his superior officer . . . shall suffer DEATH or such other punishment as by a court martial shall be awarded.”—Sec. 15.

Compulsion.

whether
command
lawful
intrinsically,or as being
the command
of a lawful
superior.

clared: "That orders are lawful when issued by authorities legally constituted and competent to give them, responsible to their sovereign and country for their acts, and for the exercise of the authority with which they are invested."⁷ That this passage is capable of two readings, depending on the application of the word *competent*, and the relation of the pronoun *them*, is beyond doubt. In the one case, the legality of the order would be judged from its own nature, the responsibility, which might attach to the performance of an unlawful act, resting with the individual obeying; the law of the land being held compulsory on the soldier, obliging him to judge of the legality of any order, to which his assent may be required; its jealousy, in fact, refusing to him, on embracing the profession of arms, the power of divesting himself of his privileges or duties as a citizen in such a degree as to render him irresponsible for his acts by pleading the order of a superior. In the other case the bare issuing an order by duly constituted authority, without reference to its nature, would render it legal; the soldier obeying being considered as the instrument only, as a mere automaton, irresponsible for acts resulting from the execution of orders issued by authorities *legally constituted*. If the former be the true interpretation of the order; if it mean that orders are lawful when issued by authorities legally constituted and *competent* (legally invested with the power) to give *them*, — the *particular* orders which may be the subject of consideration; there is no truth more evident, and no order more in unison with the ordinary acceptance of the phrase in the mutiny act. If, on the other hand, it mean that orders are lawful when issued by authorities legally constituted and competent (qualified) to give them, orders in the general sense, without reference to their nature — it is a truth hitherto unsuspected by the bulk of the army, and it would render any further discussion unnecessary, as no case could possibly arise where the order of a superior might be pleaded, where it would not at once be a perfect justification of any act resulting from the execution of such order. But, as orders are only pro-

(7) Letter of the commander-in-chief to the commander of the forces at Malta, directed to be communicated to the garrison, on the promulgation

in orders of the sentence of the courts martial on Lieutenant Dawson and Captain Atchison. *Horse Guards*, 5th Oct., 1824.

fessedly, but not invariably, in furtherance of the enactments of the legislature and in consonance with the law of the land, and as the words of the mutiny act are "disobey *any lawful command* of his superior officer," not "*any command* of his *lawful superior*," it follows that the first of the two constructions, here given to this order, must be the real one; and, therefore, it is lawful, in the military sense, to disobey an unlawful command of a superior.⁸ The true and practical intent and meaning of which appears to be, that so long as the orders of a superior are not pointedly and decidedly in opposition to the well-known and established customs of the army, or to the laws of the land; or, if in opposition to such laws, do not tend to an irreparable result; that, so long must the orders of a superior meet prompt, immediate, and unhesitating obedience. It surely cannot accord with justice to render a soldier responsible, even in courts of civil judicature, for an illegal act resulting from the execution of an order, not in itself so glaringly opposed to all law, as to be apparent without reflection or consideration: hesitation in a soldier is, under certain circumstances, a crime;⁹ and hesitation is inseparable from reflection and consideration: reflection and consideration, therefore, when tending to question the order of a superior, must, in some sense, be considered as a military offence.

596. The difficulty of defining compulsion, depending on the necessity of military obedience, would be equally great with that of ascertaining the particular cases in which disobedience of orders may be justified, on the plea of being in their nature opposed to the law of the land; the cases would mutually illustrate each other. It requires no deep consideration to comprehend and to assent to the abstract statement, that every legal order may be legally obeyed; and

Compulsion.

Difficulty of
defining
justifiable
compulsion.

(8) His late royal highness, the commander-in-chief (*the Duke of York*), on an occasion which the author does not feel at liberty fully to detail, edited the following remark: "although in these cases" (in the case before his royal highness an officer had respectfully declined to comply with the order of his superior, as to making some returns) "the general answer must be, that in every military service by land and sea, the junior

officer must obey all lawful commands of his senior officer, such officer being personally responsible for the orders he gives; yet discretion and the custom of the service place certain bounds to this rule; and the particular case alluded to falls entirely within these bounds."—M. S.

(9) Lieutenant Dawson was charged with *hesitating* and declining to carry into execution orders he had received, &c. G. O. No. 482.

Compulsion.

its converse, that every illegal order may be legally disobeyed: but there is often great difficulty in acting on these self-evident propositions.¹ The legislature has decreed the highest possible punishment, the *ultimum supplicium*, as the penalty of disobedience; compulsion, arising from military subjection, may, therefore, it is presumed, reasonably be pleaded in most cases; the will may often be either neuter or opposed to the deed. On the other hand, to carry the principle of blind obedience to the full extent to which, by easy deduction, it may be extended; to omit or render nugatory the word "lawful," inserted in the mutiny act² would not only degrade the British soldier in his own eyes, and in the estimation of his fellow-citizens, but might lay the foundation of a superstructure, dangerous, if not fatal to the constitution itself.

Compulsion from fear of death.

597. Another species of compulsion, sometimes pleaded in cases of mutiny and rebellion, arises from threats or menaces, which induce a fear of death, but the only force that doth excuse, is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels or mutineers. It is incumbent on them, who make force their defence, to show an actual force, and that "they joined *pro timore mortis et recesserunt quam cito potuerunt*."³ The following case is applicable to the question: "In 1813, a serjeant (a german) of H. M. 60th regiment of foot, who had originally deserted from the French, entered that regiment by a voluntary enlistment; on the advance of the army, under the Duke of Wellington, into Spain, he was taken prisoner by the French. To save his life, forfeited by the act of desertion, he entered into the *corps des étrangers*, set apart in the French service for such men, as an inducement to them to return to it. At the battle of Vittoria, he was again taken prisoner by the English, and

(1) The suspension of Lieutenant-colonel Capper and Major Boles, the adjutant-general and deputy adjutant-general, by Sir George Barlow and the government at Madras; the one for concurring in, and the other for signing, an order of the commander-in-chief, (General Macdowall,) in the usual course of duty, together with the reasoning of Lord Minto, in his despatch on the subject of the Madras

government, might be quoted as a case in point, and may be referred to with advantage on a consideration of the question.

(2) In the earliest mutiny acts, which recognize disobedience as a capital crime, the words are "refuse to obey his superior officer."

(3) *Alex. McGrowther's case* — *Foster*, 14.

a general court martial was ordered to try him for desertion. The first sentence acquitted him of the *act of desertion*, there being the powerful inducement to the act, with the view of saving his life; but the sentence was revised, and it is stated that, on revision, he was sentenced to suffer *death*, and was afterwards shot in the presence of that division of the army to which he belonged. I also understand that it is intimated to the above court, that the excuse pleaded by the prisoner was inadmissible, as he should have preferred death rather than to have entered the service of the enemy."⁴ Since, by the revised opinion, it appears that the evidence justified conviction, it is difficult to imagine, whatever might have been the ulterior award, how the court could have acquitted the prisoner of the *act of desertion*. They might have omitted to award punishment, if they considered the circumstances to amount to compulsion, *pro timore mortis*.

598. The prisoner having closed his defence, it may in certain cases be followed by a *reply*. The prosecutor is entitled⁵ to the reply in every case, where the prisoner has, in his defence, examined witnesses or put in documentary evidence, either proved in due form or expressly admitted by the prosecutor; the prosecutor is moreover permitted to reply when the prisoner has in his address opened *new facts*, upon his own assertion, or upon documents which he may read without proving in evidence.

REPLY:
when let
in by the
defence;

599. No reply is allowed in those cases where the prisoner, not having adduced evidence either written or parole, merely *draws inferences* from the evidence for the prosecution, or elicited from the prosecutor's witnesses on cross-examination, even should the tendency of these observations be to reflect on the conduct or impugn the motives of the prosecutor. Though no evidence may be brought forward by the prisoner, yet should he advert to any case, and, by drawing a parallel, attempt his justification, the prosecutor will be permitted to observe on the case so cited.

when the pro-
secutor is not
entitled to;

rule when case
cited;

600. It, however, seldom happens that a defence is made

(4) Hough's Practice of Courts Martial (1825), p. 364.

(5) In criminal cases, the rule, as settled by the judges in 1837, is that "if the only evidence called, on the part of the prisoner, is evidence to

character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do."

prosecutor
allowed time
for preparing,

before a *general* court martial, without the examination of witnesses; a reply, therefore, almost invariably follows the prisoner's address; and the court, in ordinary cases, grants the prosecutor a reasonable time for the purpose of preparing a written address.

how far he
may examine
witnesses to
rebut the
testimony of
defence.

601. Should the prisoner have examined witnesses to points not touched on in the prosecution, or should he have entered on an examination reflecting on the credibility of the prosecutor's evidence, the prosecutor is allowed not only to address the court in reply, but also to examine witnesses to the new matter: the court under these circumstances will be very guarded to prevent the examination by the prosecutor on any point not introduced by the prisoner. He must be confined to re-establishing the character of his witnesses,—that is, their general credibility, not the truth of a special testimony given on the trial, nor the value of any particular averment or reply;—to impeaching those of the defence, and to rebutting the *new matter* brought forward by the prisoner, and supported by evidence: he cannot be allowed to examine on any points which, in their nature, he might have foreseen previous to the defence of the prisoner.

but he cannot
repair his
omissions.

How restricted
in his reply.

602. An observation by Lord Ellenborough is much to the purpose: "If any *one fact be adduced by the defendant*, to which an answer can be given, the plaintiff must have an opportunity given for so doing; but this must be understood of a specific fact; he cannot go into general evidence in reply to the defendant's case: there is no instance in which the plaintiff is entitled to go into half his case and reserve the remainder." Matters merely stated in the defence and not proved, or which the court has stopped, the prosecutor will have the same opportunity of contradicting in his reply.⁶ The prosecutor will not be permitted to bring forward evidence to rebut or counteract the effect of matter elicited by his own cross-examination; his privilege in reply is strictly confined, as before observed, to new matter *introduced* by the prisoner, and supported by the prisoner's examination in chief. Mr. Tytler proposes the following case as an example: "A prisoner is charged with an act of mutiny, and the charge clearly proved; but the prisoner, in

(6) Judge advocate general.—Sir John Murray's trial, p. 479,

his defence, alleges and adduces evidence to show that he was compelled by others to the commission of the act, against his own will and at the hazard of his life. This being new matter, to which the former evidence for the prosecution does not in the least apply," (and which, it may be added, there is no absolute reason for assuming that the prosecutor could anticipate,) "the prosecutor is allowed to re-argue it by the examination of witnesses, or the production of such documents," (being legal evidence,) "as he thinks fit to disprove it." The same result might ensue on a charge of neglect of specific duty, should the prisoner, in his defence, offer evidence to show that severe and acute disease had prevented the execution of the order, the prosecutor not having adverted to such circumstance on the prosecution.

603. A defence resting on motive, or qualifying the imputation attaching to facts, generally lets in evidence in reply, as in such cases, the prisoner usually adverts, *by evidence*, to matter which it would have been impossible for the prosecutor to foresee or anticipate: the admissibility of evidence in reply may generally be determined by the answer to the questions: Could the prosecutor have foreseen this? Is it palpably and evidently new matter introduced by the prisoner? Is the object of the farther enquiry, not to prop up recorded testimony, but to re-establish the character of witnesses, impeached by *evidence* (not by declamation,) in the course of the defence? Is it to impeach the character of the prisoner's witnesses?

What defence lets in evidence in reply.

604. The prisoner cross-examines such witnesses as may be thus introduced in the reply, to an extent, however, limited by the examination in chief, that is, restricted to such points or matter as the prosecutor shall have been allowed to examine on.

The prisoner cross-examines the witnesses in reply.

605. When the prosecutor has been allowed to adduce evidence in his reply, the prisoner is entitled to a rejoinder, in which he may endeavour to invalidate its effect; but is not permitted to call further evidence, except to re-establish the credit of such witnesses as may, by the prosecutor's witnesses in his reply, have been impugned. Although it was laid down by the judge advocate general on Colonel Quentin's trial as "not being the regular course, nor consistent with the ordinary rules of the court," where the

REJOINDER.

When of right;

when at the discretion of the court.

prisoner has been permitted to address the court after the reply, yet there are instances of this occurring, on trials attended by the judge advocate general, and so far back as in the case of Lord George Sackville. The existing practice of courts martial usually concedes this indulgence to the prisoner without hesitation, where they would be very guarded in admitting a reply from the prosecutor, although, in strictness, the same principle may perhaps be applicable in both cases.

Sur-rejoinder,

not consistent
with existing
practice.

606-9. It was formerly the rule to allow the prosecutor a second reply⁷ or sur-rejoinder, to an extent limited by the arguments of the prisoner in his rejoinder; but the established usage of the service has for many years been more in accordance with the prevailing impression, most unmistakably enunciated in a modern work on the subject, that "the prisoner has the right to speak last."⁸ This at all events is a soldier-like doctrine, and undoubtedly more conformable with the "generous principles of the military law,"⁹ than the rule in civil cases, "that the party, which doth begin to maintain the issue, ought to conclude."

(7) "After this," (the reply of the prosecution,) "judgment should, in strict propriety, be passed. But as a general court martial is a court of equity, and honour, as well as of law, they seldom or never, in any period of a trial, shut their ears to a prisoner's vindication of his innocence. The prisoner is consequently indulged in a" (rejoinder) "reply: the judge advocate rejoins to him if he thinks proper."—*Sullivan on Martial Law*, (1784) p. 101.

(8) Napier's Remarks on Military Law, p. 92.

(9) The writer from whom this phrase is adopted, thus continues: "This circumstance, of a rejoinder being allowed the prisoner in a criminal trial before a court martial, and not in the courts of common law, tends greatly to confirm the doubt expressed above in regard to the truth of Major Adye's position, that 'where

the act of parliament and articles of war are silent, courts martial must in their proceedings conform to the practice of the established courts of judicature.' Now, this method of proceeding is neither directed by that act, nor by the articles of war; nor is it conformable to the practice of the civil courts; notwithstanding, Major Adye himself allows it to be regular and legal. Whence, then, does the practice deduce its origin, and by what authority is it established? This question, I apprehend, we shall find it extremely difficult to answer, without the supposition of some other law, independent as well of the mutiny act and articles of war as of the civil law of the realm. Now, what can this be but the custom of war, *lex non scripta* of the army, to which the common law is correspondent, as the statute law is to the written rules and articles of war."—*Williamson's Notes*, p. 67.

CHAPTER XVI.

JUDGMENT OF THE COURT.

Finding.

610. THE next stage of the proceedings of the court martial, (the defence having finally closed and the court being cleared,) is the deliberation, with a view to the finding and sentence. A fair copy of the record of the proceedings is generally read over; indeed, where fair copies are made, it appears but right that the members should have an opportunity of ascertaining that the copy, to which their judgment is annexed, is a correct report of the proceedings. In intricate cases, and where the proceedings are voluminous, the judge advocate is usually prepared with such notes, or index to the evidence, as may assist the court in their reference to the record when deliberating.

Deliberation.

Proceedings
read over.

611. Perfect impartiality ought most clearly to be the paramount object of the court collectively, and of each individual composing it. There should be no wish for the guilty to escape, or for the innocent to suffer. No false pity, no undue severity, should influence their judgment. Caution in deliberating, and patience in investigation, should equally be the aim of each member, and characterize the judgment of the whole. That which Locke has said on the conduct of the understanding, may be beneficially applied when weighing evidence in a court of justice: "We should keep a perfect indifference for all opinions: nor wish any of them true, or try to make them appear so; but, being indifferent, receive and embrace them according as evidence, and that alone, gives the attestation of truth. He that, by an indifferency for all but truth, suffers not his assent to go farther than his evidence, nor beyond it, will learn to examine, and examine fairly, instead of presuming."

Weighing
evidence,the solemn
duty of the
court.

The judge
advocate offers
no opinion.

612. It may be observed, that the duty of the judge advocate, *at this stage* of the proceedings, being simply ministerial—to act as registrar of the court, and to advise on legal points when his opinion may be demanded,—he necessarily abstains from making any remark, by which his judgment, as to the guilt or innocence of the prisoner may be ascertained.

Witness may
be recalled by
court for
particular
question.

613. Though the prosecution and defence be closed, and the court cleared for final deliberation, it is still competent to a court martial, as to a jury, (by whom it is often practised,) to recall a witness for the purpose of putting any particular question deemed essential: the parties must necessarily be present.¹

Opinion:

614. Sufficient time having been given for deliberation, and it is presumed that, in most cases, each member will desire to review the proof which has been laid before the court on either side, and to consider its bearing as affecting the charge, the president² (the judge advocate formerly performing his duty) puts some such question as the following, to each individual member, according to seniority, beginning with the youngest:³ *From the evidence in the matter now before you are you of opinion that the prisoner is guilty or not guilty of the charge alleged against him?* When the charge consists of several counts, they are put consecutively, and where more than one prisoner is arraigned on the same charge, each must necessarily be particularized, and the question repeated with respect to each. The judge advocate usually notes the opinion of each member as he delivers it; but whether this memorandum is to be reserved³ or destroyed, when the aggregate opinion is recorded, must be left to the decision of each individual judge advocate. The judge advocate swears not to disclose or discover the vote or opinion of any particular member, unless required to give evidence thereof by a court of justice or court martial; he would, therefore, voluntarily and needlessly incur a great responsibility by unnecessarily retaining possession of a memorandum, the loss of which (except it be made in cipher) might fully

whether a
written
memorandum
of the vote of
each member
should be
retained.

(1) See hereafter, § 948.

(2) Art. War, 165.

(3) Mr. Tytler in the first edition of his work (1800) p. 371, gave his

opinion that it was proper to preserve it;—this he omitted in a subsequent edition (1806) revised by himself, p. 363.

reveal the vote and opinion of each member at a glance. Nor can it well accord with the spirit of the oath, to do that unnecessarily, which may lead, in the ordinary course of events, as in case of death, to an exposure of that which it has been the object of an oath to render secret.

615. It is scarcely necessary to observe, that as the concealment of the opinion of each particular member is provided for by an oath, specially framed for the purpose, it would be highly reprehensible to make public the opinion of all by recording that the finding was unanimous.

Opinion not to be expressed as unanimous.

616. Except to pass⁴ sentence of death, where *two-thirds*⁵ of the members present must concur,⁶ the court passes judgment by the majority of voices: and should the court (which usually consists, when sworn in, of an uneven number of members,) be reduced, by death or sickness, to an even number, and their votes be equally divided as to the finding, the prevailing custom of the army is, that the prisoner should have the benefit of an acquittal.⁷

What majority is necessary on passing judgment of death.

Votes equally divided, prisoner is entitled to an acquittal.

617. To meet the difficulty which might arise from an

(4) In 1828 and previous years this provision was worded "no sentence of death shall be given:" in 1829 it was altered to the present form, "no judgment of death shall pass." It is presumed that this change was made with a view of requiring the concurrence of two-thirds in the opinion, as well as in the sentence, in all capital cases.

(5) In calculating the *two-thirds*, the prisoner has the benefit of any broken number: *nine of thirteen* were formerly specified, and in like manner it would be necessary to have the concurrence of *four of five*, *five of seven*, &c.

(6) Mut. Act, sec. 18. Art. War, 118. In the year 1762, Major Colin Campbell, of the 100th Regiment, was tried by a general court martial at Martinique, for the wilful murder of Captain M'Kaarg, of that regiment. The sentence of the court was as follows: "The court, on due consideration of the whole matter before them, are of opinion that Major Colin Campbell is guilty of the crime laid to his charge; but there not being a majority of voices sufficient to punish with death, as required by the articles

of war, the court doth adjudge the said Major Commandant Colin Campbell to be cashiered for the same, and it is the further opinion of the court, he is incapable of serving His Majesty in any military employment whatever." In the present day this sentence could not be maintained. On a charge for murder, the sentence cannot be "contrary to the usages of English law in regard to the punishment of offenders." (Art. War, 145.) The finding of guilt on a charge of murder, by less than two-thirds, would amount to a virtual acquittal; but a verdict of manslaughter being found by any majority under two-thirds, penal servitude or imprisonment might be awarded.

(7) It does not appear necessary to reproduce the arguments by which the author justified the above statement, as it has been subsequently confirmed by an opinion of judge advocate general Sir R. Grant, conveyed in a letter to the deputy judge advocate in Ireland, dated the 15th January, 1834, to the effect that a court martial being equally divided, the president has no casting voice, and it amounts to an acquittal of the prisoner.

Obsolete
irregularity
of withdrawing
members
above thirteen,

condemned by
His Majesty.

If the judges
are equally
divided in
opinion, no
decision takes
place.

McArthur's
opinion as to
the judgment
of courts
martial,

objection
against.

equal division of votes, it was formerly the occasional practice, on the closing of the court for final deliberation, to withdraw so many of the junior members, as might reduce the court to *thirteen*. This expedient was resorted to on a court martial which took place at Exeter, in 1806, on Quartermaster Heady, of the 3rd dragoon guards, and was strongly animadverted on in the order which promulgated the sentence: "His Majesty having observed, on the face of the proceedings, an entry made on the 28th October, viz., 'of public notice to the parties concerned, that the court consisting of fifteen members, when the opinions of the members are collected, the junior officers will not vote' has been pleased to command that the court martial may be informed, that they do not appear to have been sufficiently instructed in the practice of courts martial, it being proper, on every account, that every member who is sworn on a court martial, and who has not been prevented from attending should give his opinion, (each party, the prosecutor and prisoner, having a right to such opinion) and His Majesty has therefore been pleased to command that his pleasure should be declared, that the vote of no officer who is sworn on a court martial ought to be dispensed with, merely on account of the number of members exceeding thirteen."⁸

618. On questions reserved for the consideration of the judges, a majority only can decide, and if the judges should be equally divided in opinion, no decision takes place.¹ Mr. McArthur, influenced, no doubt, by this custom, has given it as his opinion: "That should there be an equal number of votes on each side, and the several members of the court, upon reconsidering the point at issue, adhere to the first opinion, the question remains undecided."² Were this the case, the prisoner might, as elsewhere observed, be liable to be tried a second time, not having been acquitted or convicted; but the advantage which may possibly arise from the opportunity afforded of punishing the guilty, would be infinitely overbalanced by the disrepute in which courts martial may be brought by the public exposure of their fallibility to the soldiery, and by the doubt which would be thrown on the justice of their proceedings.

(8) G. O. 20th December, 1806.

(2) 1 McArthur, 259.

(1) *Rex. v. Cullan, Russ. and Ry.* 157.

619. The practice formerly was that, should the court be equally divided in opinion, the president should be allowed a double voice: the rule was thus laid down in a long series of the earlier articles of war; "The sentence shall be according to the plurality of votes, and if there happen to be an equality of votes, the president is to have a casting voice." Notwithstanding the omission of this clause, the custom has survived to the present time, as has before been observed, (§ 456) *so far* as the decision of questions respecting the admission or rejection of evidence, and other similar points, may extend; it arises from the necessity of arriving at such a conclusion as may permit the progress of the trial, as courts martial, like judges in the civil courts, have absolute power, which they invariably apply, to admit or reject evidence.³

The president was formerly entitled to a double vote on all questions;

such is the case only as to questions of evidence or interlocutory decisions.

620. Where several prisoners are tried on the same charge, the finding in respect to each must be separate and distinct, nor can courts martial give a general verdict of guilty, where the charge comprises several charges or counts; they must record their opinion on each separately; but after finding on each of the charges they award punishment for them in the aggregate.

Finding cannot include several prisoners, or be general as to several charges in the aggregate,

621. Nor is it necessary to find a general verdict of guilt or acquittal upon the whole of each charge or count. The finding may be special, that is, it may state specially what facts, as charged, the court finds to be proved,⁴ or, it may amend variances not material to the merits of the case. (§ 851) Lieutenant-colonel Broughton, of the 1st West-India regiment, was arraigned before a general court martial, in August 1807, on five charges, the fifth being "for unofficer-like conduct, in making a false certificate on each monthly return, during the time he commanded the regiment, from June 1806, to the present period, viz., that he had read the articles of war to the men under his command, whereas the articles of war have neither been read by him, nor any other person by his order, during that period, to the prejudice of

but may be special on each part of charge.

General order correcting erroneous impression as to general verdict.

(3) Any evidence assumed to be improperly admitted or rejected (§ 576) by a court martial, or any interlocutory decision, may, by the prisoner, be brought under the special consideration of the sovereign, or the officer autho-

rized to confirm the sentence, as questionable evidence, admitted by a judge, is brought to the consideration of the judges.

(4) See § 831.

Declaration of
His Majesty to
that effect;

the service." With respect to this charge, the court was of opinion, "that the prisoner was not guilty to the extent laid in the said charge, inasmuch as the prisoner was thereby charged with signing a false certificate on each monthly return, during the time he commanded the regiment, from June 1806, to the present period; and it appearing from the evidence, that in some of the months during that time, he did not sign such false certificates, the court did, therefore, acquit him of the said fifth charge; but was of opinion, that the prisoner was reprehensible for his inadvertency and want of proper caution, in not examining every certificate previously to his signing it, which it was his duty so to have done." His Majesty was pleased to approve and confirm the sentence of the court martial upon the first, second, third, and fourth charges, but not to confirm the finding of the court upon the fifth charge, "as it appeared to have proceeded upon the *erroneous supposition* that a court martial are bound to find a *general verdict* of guilt or acquittal upon *the whole of every charge*; and as the court have expressed their opinion, that the prisoner was guilty of a part of the fifth charge, they might, in conformity to that opinion, have found him guilty of that *part of it*, and have acquitted him of the *remainder*, instead of acquitting him generally of the whole."⁵

the court must
acquit or
convict on each
part

622. Not only may the court find the accused be guilty of the facts to a certain extent, but facts having been proved, the imputation grounded thereon may nevertheless be thrown out⁶ either entirely or partially; or no criminality, or a less degree than that charged, may be imputed by the court;⁷ the prisoner must, however, he unequivocally acquitted or convicted of every part of each of the several charges of which he stands accused.

Finding
should be
precise;

623. Courts martial would do well to define the degree of guilt which they impute to the prisoner, or find him guilty of, or the extent to which they may deem the accusation proved; and particularly upon constructive charges, where the essence of the charge, and the applicability of an express punishment, may rest on imputation built or grounded on

(5) G. O. 26th January, 1808; see also G. O. No. 579, 3rd charge; and G. O. No. 394, 1st charge. (6) G. O. No. 416, and G. O. No. 424, 4th charge; and see § 839. (7) See § 834-8.

the facts.⁸ Such discrimination is desirable, not only in order to observe an apparent consistency as to the sentence, when contrasted with other sentences on convictions upon similar charges (the sentence with the finding and charges only being published to the army,) but to render the subsequent duty of the court, in awarding punishment, clear and unobstructed.

Acquittal.

624. Where the court has found that the prisoner is "not guilty" of the whole of the charge, it immediately proceeds to enter an acquittal — "*Therefore*" acquits the prisoner is the invariable formula, but there are several forms in which the acquittal may be expressed, and it is much the custom to attach some epithet to an acquittal which is intended to be clearly and decidedly satisfactory. The forms *honourably*; *most honourably*; *fully*; *most fully*; *fully and honourably*; *most fully and most honourably*; are often used by courts martial; and when the charge bears on the honour of the accused, or where the charges are satisfactorily disproved, it is in fact (adverting to the prevailing custom), but justice to adopt one or other of them, being careful not to use "*honourably*" in any case where the charge, if proved, would not have reflected on the prisoner's honour.

Form
"therefore,"
and sometimes
a special
addition.

Forms of
acquittal.

625. Courts martial sometimes acquit, *the charge not having been proved*, which is still less satisfactory than a bare acquittal; the degree of censure involved in it being reflected and regulated by the nature of the charge. It is questionable whether such an acquittal ought to be recorded. In the literal sense, no better reason could be given for an acquittal than that *the charge had not been proved*; — such must, in fact, be the grounds of every acquittal. But as the expression of this reason is unusual, and is calculated to confirm the imputation propagated by the charge, the innuendo conveyed by it appears unjustifiable, and may be more injurious to the prisoner than a qualified verdict of guilt; particularly in cases affecting the honour and respectability of an officer. Such ambiguous sentence ought the more to be avoided, since it is not in the power of the accused, by any representation or exertion, to procure the re-hearing of

Charge not
proved, an
exceptionable
form.

(8) Some observations bearing on head, *It is sufficient to prove the substance of the charge.* — § 831-55.

the case by a court martial. The court is bound to administer justice according to the *evidence* (the actual evidence) in the matter before it; *the point in issue is to be proved by the party who asserts the affirmative*; it is not competent to a court martial to frame a verdict *on* the absence of evidence or the want of proof, though it may obviously and necessarily result *from* it. Under such circumstance, the acquittal ought to depend on that just and reasonable principle of English law: *Innocence is to be presumed till the contrary is proved*. The judgment in this, as in every case, should be couched in language free from ambiguity and not exposed to malevolent interpretation.

Enquiries as to Previous Convictions and General Character.

Upon a finding of guilt, the court re-opens for enquiries as to previous convictions and general character, &c.

626. Upon a finding of guilty, either of the whole or of any part of the charge, the court, in the case of a soldier, must necessarily re-open, as it is required by the Queen's regulations at this stage of the proceedings¹ to enquire, in presence of the prisoner, into and record "his previous convictions, if any, and his age, length of service, the class to which he belongs (§ 674), and previous character, and what decorations or other honorary rewards he may be in possession of, for its own guidance, in awarding punishment, as well as that of the confirming authority in sanctioning its being carried into effect. The evidence under this head is invariably to be given by a commissioned officer."²

Previous convictions may in like manner be proved against officers,

627. This regulation applies only to the case of "a soldier," nor was any provision made for the reception of evidence of previous convictions against an officer before the mutiny act of 1847, when the court was empowered to receive evidence against "any prisoner." This was more distinctly expressed in 1857, as "any person subject to the articles," but commissioned officers were then expressly excepted, as in the article hereafter quoted, as respects convictions by courts of ordinary criminal jurisdiction, and precise directions were given as to the "Officers' Court Martial Book,"³ which were omitted on the revision of the articles in 1860.⁴

but only those by courts martial.

(1) Queen's Reg. p. 223.

(2) This last sentence was added to the Queen's regulations in 1859.—See § 634.

(3) The Queen's Regulations continue to require the "officers' court martial book to be kept as a confi-

dential document by the commanding officer of every regiment and dépôt."—Page 391.

(4) There is no authority for any enquiry by a court martial as to the general character of an officer. In

628. The corresponding clauses in the mutiny act were omitted in 1860, and the article of war,—as it was then altered and as it now stands, after successive alterations during the thirty years from the first establishment of this enquiry in 1830,—is as follows:⁵

The amended article of 1860, as to enquiries as to previous convictions.

“After any person subject to these articles has been found guilty, the court martial before which he has been tried may, before passing sentence, and for the purpose only of awarding punishment, receive in evidence against him any previous conviction or convictions,⁶ the proceedings of which have been duly confirmed, and any previous conviction or convictions of any such person (not being a commissioned officer) by a court of ordinary criminal jurisdiction; — but before any such evidence shall be received, it shall be proved to the satisfaction of the court that the prisoner had previously to his trial received notice⁷ of the intention to produce such evidence against him; — and the court shall not award any other punishment or punishments than may be legally⁸ awarded for the offence of which the court shall then have found him guilty.”

Previous notice to prisoner.

629. The articles of war provide that in the case of previous convictions by courts martial, the court martial book or the defaulter book of the regiment, corps, troop, or company, and when none of those books can conveniently be produced, a certificate which shall purport to contain a copy of the entry of such convictions in any such books, and which shall be signed by the adjutant or other officer having the custody of the court martial book or of the defaulter book of the regiment, corps, troop, or company to which the prisoner belongs, shall be *sufficient* evidence of such conviction.⁹

Sufficient evidence of convictions by courts martial;

deed, in the case of an officer, the receiving of any evidence to this point, unless brought forward on the defence, would obviously be prevented by considerations of convenience and decorum, which are not applicable as regards the recorded judgments of courts of justice.

(5) Art. War, 156. See the more important alterations in former editions of this work.

(6) The articles and act of 1859 and previous years insert “by courts martial,” which words are necessary

to complete the sense, and, doubtless, have been omitted by an oversight.

(7) See § 419. It is incumbent on the prosecutor to prove to the satisfaction of the court that the prisoner has received due notice of the intention to produce evidence of the previous convictions, as the court cannot otherwise entertain the enquiry.

(8) For “legally” former articles read “by the mutiny act and by these our articles of war.”

(9) Art. War, 157; and see Explanatory Directions, par. 521.

by civil courts.

630. In the case of a conviction by a court of ordinary criminal jurisdiction, a certificate, transmitted as provided for in the 39th section of the mutiny act,¹⁰ to the officer commanding a regiment or other corps by the clerk of any such court, or other officer having the custody of the records of such court, or the deputy of such clerk, setting forth the offence of which the prisoner was convicted, together with the judgment of the court thereon, and purporting to be signed by such clerk or other officer, or by the deputy of such clerk, or if such certificate cannot conveniently be obtained, a copy thereof, duly certified by the officer producing it, shall be *sufficient* evidence of such conviction.¹¹

631. This evidence, it will be observed, the law declares *sufficient* in every case, nor is it necessary to prove the signature or official character of the person appearing to have signed either of the above-mentioned certificates; — nor if the court be satisfied from all the circumstances of the case that the prisoner under trial is the person mentioned therein, shall it be necessary to give other proof of the identity of the person of the offender.¹ Where an offender has passed under different names, his convictions will of course appear under the name he bore at the time,² and evidence may then be given as to his identity, as in other cases, if required by the court.

632. It is scarcely necessary to remark, on the re-opening of the court to receive evidence of previous convictions, the parties to the trial being admitted, that the prisoner, if he should desire to do so, has a right to examine witnesses or to produce evidence to rebut that brought against him; it can only be to afford the prisoner this opportunity, that notice is so imperatively enjoined. It must however be understood, that the only fact put in issue, on the enquiry as to previous conviction, is the conviction itself.

(10) "Whenever any officer or soldier shall have been tried by any court of ordinary criminal jurisdiction, the clerk of such court or other officer having the custody of the records of such court, or the deputy of such clerk, shall, if required by the officer commanding the regiment or corps to which such officer or soldier shall belong, transmit to him a certificate setting forth the offence of which the

prisoner was convicted, together with the judgment of the court thereon if such officer or soldier shall have been convicted, or of the acquittal of such officer or soldier, and shall be allowed for such certificate a fee of three shillings." Mut. Act, sec. 39.

(11) Art. War, 158.

(1) Art. War, 159.

(2) Letter, Judge Advocate General, 18th Oct., 1831. See § 390.

Whether convicted in his own or under different names the identity of the prisoner must appear to the court.

The prisoner is present, when evidence as to convictions and character is received; and may produce testimony to rebut that brought against him;

the only fact in issue being the conviction.

633. The mutiny act and articles of war are altogether silent as to enquiries as to previous character. Courts martial were formerly authorized, if they thought fit, to enquire by evidence into the general character of the prisoner, "to enable it to mete out punishment so as to satisfy the ends of justice with greater precision.³ They are now required always to enquire into this, and the other particulars specified in the regulations (§ 626), when a soldier has been found guilty, "for their own guidance in awarding punishment, as well as that of the confirming authority sanctioning its being carried into effect."

GENERAL
CHARACTER.

Enquiries as to
general
character,
age and services
and class,
are now
imperative,
in the case of a
soldier.

634. It does not appear desirable to resort to the adjutant for evidence as to character, the captain of the prisoner's troop or company is clearly the most proper person to speak to this point. The regulation now prohibits a non-commissioned officer⁴ ever being called upon, even when the only officer present, who may know the prisoner, should happen to be the prosecutor, and no other officer, who knows the prisoner, can be made available.

An officer of
the prisoner's
company,
ought, if
possible, to be
examined on
this point.

635. It is particularly to be noticed that the enquiry is confined to the *general* character of the accused; particular offences cannot be referred to, much less can the circumstances, relating to offences for which the prisoner may have been formerly tried, become the subject of renewed investigation. Neither can it with propriety be stated, without referring to the offences, that the prisoner has been confined a certain number of times within a specified period. A witness examined with a view to general character may, in order to refresh his memory,⁵ and to be better enabled to

Enquiry cannot
be extended to
particular acts
of misconduct;

witnesses
restricted to
general opinion
of prisoner;

(3) Circular—Horse Guards, 24th Feb., 1830.

(4) See § 626 (2). The contrary practice had been previously forbidden in the standing orders of many local commands. The objection, to the practice of non-commissioned officers appearing to give this evidence, was so well put in the standing orders of the Northern District, by the late Sir Charles J. Napier, when he held that command, that no apology will be required for appending the following extract:—"The major-general wishes it to be understood that his objection to non-commissioned officers being ex-

amined by courts martial as to the character of prisoners, does not arise from any want of confidence in the honour of this highly respected body of men, but because he considers it a reflection upon the officer of the company who is thus passed over, as it implies an ignorance of the soldier's character, and no man is fit to hold a command, who is not acquainted with his men, and ready to speak for or against them, as the truth demands."

(5) See § 959: "Witness may refer to notes."

answer the general questions, refer to the defaulter's book; but he cannot be permitted to read from it, to lay it before the court, or to state the facts which it records. He must be restricted to a *general* opinion, which he cannot be permitted to support by reference to *particular parts* of the conduct of the prisoner; as it would at once, and without any notice, put him on his trial for every act of his past life which may be referred to. It will be for the accused either to submit to the imputation cast on his *general* character; to meet it by conflicting testimony; or if he think fit, to cross-examine the witnesses, as to their means of knowledge, and as to the facts or grounds which may have led to the opinion given.⁶

prisoner may
cross-examine
as to grounds
of opinion.

SENTENCE;

636. The court, having found a verdict of guilty, or having again closed after disposing of such proceedings as may have arisen on enquiries as to previous convictions, general character, and service, proceeds to pass sentence. It is to be observed that on a finding of guilt, there is sometimes no room for farther deliberation, since the punishments to be applied to particular offences are in many cases specially enjoined, as *death* for murder (§ 1122), and *cashiering* for certain military offences (§ 122). The act of the court in passing sentence, in such a case, is therefore ministerial rather than judicatory. Under these circumstances, it will be the duty of the officiating judge advocate (§ 466-7), and more particularly when the court is assembled in default of a competent civil tribunal for the trial of civil offences, to point out the law which bears on the question.

guilt being
pronounced a
prescribed
sentence, in
certain cases,
supersedes
deliberation.

637. Notwithstanding the conflicting opinions,⁷ the pre-

(6) In confirming the sentence upon Private William Barry of the 3rd Bengal Europeans, General Lord Clyde, in addition to other remarks, observed:—"The Commander-in-Chief was much surprised to observe that this soldier's general character was described as "indifferent," notwithstanding that he has been only twice before the commanding officer since March, 1856, and not even before the commanding officer of his company for any serious offence since October, 1857. Officers giving evidence as to character should be very careful as to the term they use, that the soldier may not be able, by cross-

examination, to show that he has been unjustly stigmatised."—G.O. 21st Sep. 1859.

(7) Mr. Tytler (Essay, p. 312) gave it as his opinion those members who have voted for an acquittal may vote on the question of punishment, in order to render it as mild as possible. But if the award of punishment ought to be guided by the personal opinion of members, would it not, under this supposition, be a violation of justice, and of the oaths of those members who voted for an acquittal, to award the slightest punishment? If an inconsiderable punishment were awarded by

vailing custom of the army is, that each member should give his vote as to the nature and degree of punishment, though he may have voted for acquittal. The majority, in every case, binds the minority; the opinion of the majority is the opinion of the court. As a court martial acts in the twofold capacity of judge and jury, and as the law has nowhere entrusted this last, or any other, function to a *part only* of the court, it would seem that the court, having performed the duty of jurors in finding a verdict, is imperatively required by the law to proceed, in the character of judges, acting *independently* of their individual votes as jurors, to award punishment *equal and adequate to that* degree of guilt of which the prisoner *has, by the court*, been adjudged and declared guilty.

Each member
to give his vote
for punishment,

adequate to the
degree of guilt
found by the
majority.

638. In cases not discretionary, it necessarily and inevitably follows that the punishment is in accordance with the finding of the court, and cannot be alleviated by the individual opinion of a member as to the guilt or innocence of the prisoner. Members swear that they will administer justice, according to the articles of war; now these articles appoint fixed penalties on *conviction* of stated crimes and, on *conviction* of other crimes, render the offender liable to certain punishments. Conviction takes place upon the opinion of the majority, and cannot, without a gross violation of consistency, be rendered nugatory or contravened by a subsequent act of the minority. On an interlocutory decision as to the admission or rejection of evidence, as well might the minority, which voted for rejection, discard from their minds, or decline to be influenced by, the testimony, which, according to their *individual* judgment, was irregularly admitted.

639. In the year 1834 the judge advocate general was

the minority, with a secondary view, and that to countervail the consequences of conviction by the majority; as well might the majority vote for an excess of punishment, not proportioned to the finding, to allow for the neutralising effect of the votes of the minority, and thus to re-establish the effect of the conviction, and preserve the decision of the court inviolate.

Mr. M^rArthur, following Sir Charles Morgan, argued that the prisoner ought to have the presumptive opinion of

those members who have absolved him, thrown into the scale with the voices of those who incline to the lesser punishment. (2 *Courts Martial*, (1813) p. 314.) Such practice would undoubtedly relieve members, who vote for acquittal, from awarding punishment where, according to their private judgment, none is due; but it would not obviate the other inconsistencies which must arise from members acting independently, and not in consequence of the aggregate opinion of the court.

Officer tried for refusing to award punishment.

required to give his opinion on this most important point by the general commanding in chief (Lord Hill). It altogether confirms the view which is here taken on the subject of members voting on the question of sentence, whatever may have been their individual vote on the finding by the court. Some years after the author's remarks had been published in the earlier editions of this work, it was made known to the army in India under the following circumstances:—An officer was placed in arrest by the president of a regimental court martial, and brought to trial before a general court martial held on the 6th March, 1839, on a charge for irregular and unofficerlike conduct in twice refusing to perform his duty as member of a regimental court martial, when called upon to do so by the president of the said court. Upon evidence being required before the court, and the obligation to secrecy being thus at an end, it was alleged on the part of the prosecution that this officer had refused to vote on the question of punishment, he having voted for a finding of not guilty.

Opinion of the judge advocate general.

640. The court acquitted the prisoner, which sentence was disapproved by the commander-in-chief at the presidency and by him referred to the commander-in-chief in India (Sir H. Fane), whose remarks, dated 29th May, 1839, give the above-mentioned (§ 639) decision, as follows:—
“Upon a finding of guilty by a court martial, I am of opinion, that although all the members of the court may not have concurred in it, it must be deemed the finding of the whole; and the members who voted for acquittal may be called upon to vote upon the punishment to be awarded on the prisoner as if they had concurred in the finding of guilty.”

Where opinions differ as to the punishment, the majority decides;

absolute majority in all cases.

641. Where the opinions of members differ as to the nature of the punishment, it is usual to separate the question, and, before entering on that of the *quantum*, to ascertain the *nature*: the majority must decide, nor is it enough that this majority should be *relative*, it must be *absolute*: it is not “sufficient that a greater number of votes should be given for any *one* punishment than for any other punishment, unless that greater should form a majority of the whole.”^a

(8) Opinion of judge advocate general, 12th Aug. 1834.

In every case of judgment of death two-thirds of the members present must concur.⁹

Two-thirds in capital cases.

642. After the nature of the punishment has been decided on, it was an expedient, not unfrequently resorted to at the beginning of this century, when the members differed as to the quantum of corporal punishment, imprisonment, or transportation, for the aggregate amount awarded by all the members collectively, to be divided by the number of members constituting the court, in order to determine the number to be inserted as the punishment, all broken portions being discarded in favour of the prisoner; but this practice was decidedly erroneous, as the opinion of the majority of the court must have been often overruled; whereas in this, as in every case, as above stated, the opinion of the majority ought to prevail.

Fixing punishment by taking an average is illegal.

643. Should the court be equally divided as to the nature or quantum of punishment, it has hitherto been the practice to give the prisoner the benefit of the more lenient judgment. Indeed, the condition which requires an absolute majority, is in most cases literally satisfied by some member, or often the whole court, being found, on reconsidering the question, to have coincided in that opinion which leans to the side of mercy. Whatever the first impression of members, the ultimate opinion of the majority must determine the amount and nature of punishment.

Votes being equal, the more lenient sentence awarded.

Punishment fixed according to the revised votes of the majority.

644. With respect to the wording of the sentence, in all cases of joint trial, it is necessary that it should be drawn up separately for each prisoner. In cases *discretionary* with the court, no special form of sentence is necessary to its legal effect; it should obviously be expressed in clear and unambiguous language. The regulations prescribe appropriate forms in certain cases, hereafter specified, and expressly direct that "when a part of the sentence is obligatory, such as *reduction*, or, in cases of 'habitual drunkenness,' *forfeiture of pay*, it is to precede the award of any other punishment."¹ In cases *not discretionary*, the court would do well to adhere as literally as possible to the terms of the statute or article of war, by virtue of which the punishment is awarded, though it is not necessary, nor would it be

Wording of sentence.

(9) Mut. Act, sec. 8. Art. War, 118. See § 616.

(1) Queen's Reg. p. 226.

Wording of sentence.

advisable to refer expressly to any particular section or article,² as it may by possibility give rise to vexatious prosecutions in the superior courts of civil judicature. This caution is not so frequently necessary as formerly, since the only peremptory punishment, now enjoined by the articles of war, is *cashiering*, except *discharging* in the case of a chaplain convicted of misconduct or vicious behaviour derogating from his sacred office; and suspension under the eighth article; whereas, *cashiering*, *dismissal*, *discharging*, were heretofore enjoined, and that without any observable discrimination in their application.

Capital punishment.

645. *Capital punishment* may be either by shooting or hanging: for mutiny, desertion, or other military crime, commonly by *shooting*; for murder not combined with mutiny, for treason, and piracy accompanied with wounding or attempt to murder, which are the only civil offences now punishable with death, by *hanging*, as the sentence must of necessity accord with the usages of English law in regard to the punishment of offenders. The wording of the sentence sometimes runs thus: *doth adjudge A. B.* (the prisoner) *to be shot to death by musquetry*; or that he *do suffer death by being shot*; or that he *be hanged by the neck until he be dead, at such time and place as* (the competent authority) *may appoint*.³

Penal servitude.

646. Transportation has now been replaced by penal servitude in every case, but this being also a punishment equally unknown to the common law of England, to the custom of its ancient military courts, and to courts martial, cannot be awarded except in cases expressly, provided for by the written law, which have been already specified (§ 150, 154) in so far as relates to military crimes.

Term at discretion of court, commences on day of signature of sentence

647. Whenever penal servitude can be awarded for military offences by courts martial, the period is discretionary, and may be either for life or for a term not less than four years.⁴ Every term of penal servitude is reckoned as com-

(2) The phrase "which being in breach of the articles of war," is very generally used in wording the sentence for military crimes; but an adherence to it is not essential nor does it appear particularly desirable. See § 403.

(3) The statute which declared that the body of every murderer should, after execution, either be dissected or hanged in chains, is repealed; and such addition cannot now be awarded by a court martial.

(4) Art. War, 118.

mencing on the day on which the original sentence (that is to say whether it may have been revised or not), may have been signed by the president,⁵ except in any case where an offender may be already under sentence of imprisonment or penal servitude, and the court may award a sentence of penal servitude to commence at the expiration of the imprisonment or penal servitude under the former sentence.⁶

or at expiration of former sentence.

668. It is not competent to a court martial to sentence *incapacity* to serve Her Majesty in any situation, civil or military, there being no longer any case specially declared to be so punishable, which appears from the following order, issued on the promulgation of the sentence of a general court martial held at Halifax, in 1816, on Lieutenant Harry Thomas Heath, of the 7th battalion 60th regiment, who was found guilty of desertion, and sentenced to be cashiered and rendered incapable of ever serving His Majesty again in any capacity: "His Royal Highness the Prince Regent has been pleased, in the name and on the behalf of His Majesty, to approve the finding, and confirm so much only of the sentence as adjudges the prisoner to be cashiered; the court not being authorized to adjudge the remaining part of the sentence for the crime of which he, Lieutenant Heath, has been convicted."⁷ That a court martial may, in its sentence, declare *unworthiness* or *unfitness* to serve, is evident from the award of many courts martial approved by His Majesty, particularly that on Lieutenant-general John Whitelocke.⁸

Courts martial cannot sentence incapacity to serve, except in cases specially provided for;

may award unworthiness or unfitness,

669. A court martial is incompetent to award, in any case, that the prisoner be cashiered and *is hereby cashiered accordingly*.⁹ By the adoption of such words, the court exceeds the power and authority vested in them, which must be apparent on a moment's consideration, as cashiering does not take place, nor is the sentence in any case operative, until confirmed. Such sentence by naval courts martial is not incorrect, because the award of the court takes effect the moment it is pronounced in open court.

cannot use the words *is cashiered accordingly*.

670. It has been observed that reprimands vary from a public and severe reprimand to a private admonition. Re-

Reprimands,

(5) Art. War, 141.

(6) Mut. Act, 28; Art. War, 141. See § 786.

(7) G. O. No. 412.

(8) G. O. 8th November 1808.

(9) G. O. 1st July, 1814; 6th March, 1815; 8th March, 1815.

primands are sometimes given, and in certain cases, apologies exacted in conformity with the sentence, in the presence of the court martial re-assembled for the purpose,¹⁰ or in the presence of a corps of officers. When public, a reprimand may also be given at the head of a regiment, brigade or division, paraded for the purpose of being present at it; or it may be conveyed in general orders. A private reprimand is usually given by the commanding officer of a regiment or brigade, at his quarters, in the presence of the officers of the regiment; or of the officers of equal and superior rank only, or simply in the presence of a staff officer. Admonition is either implied by the terms of the sentence, or conveyed by a superior or commanding officer, and commonly not in the presence of witnesses, except perhaps the personal staff of a general officer or the adjutant of a regiment. The manner, and also the time, of delivering the admonition or reprimand is appointed by the confirming authority.

are inflicted as may be directed by the confirming authority.

Apologies dictated.

Case of Lieut.-general Murray and Sir W. Draper.

Orders respecting, by the King.

671. Courts martial, in cases of disrespect to superior officers, or in consequence of quarrels, have occasionally dictated written and verbal apologies, a very noted instance of which happened in 1783, when Lieutenant-general Murray, who had been commander-in-chief at Minorca, was tried by a court martial on account of his defence of Fort St. Philip and alleged personal pique towards Sir William Draper a general officer under his command. From some circumstances which transpired in the course of the trial, the court apprehended unpleasant consequences when the restraint of the court martial should be taken off, and therefore entered some remarks on the minutes of their proceedings for the consideration of His Majesty, making known the temper and disposition of the parties towards each other. His Majesty was pleased to approve entirely the part taken by the court; and directed it to be re-convened to take into

(10) See the sentence of the court martial on Colonel Debbieg, of the engineers, tried for writing disrespectfully to and concerning the Duke of Richmond, master general of the ordnance. (2 M^cArthur, 359.) See also a very extraordinary sentence on Lieutenant-colonel Walcot, of the 5th regiment of foot, (Samuel, 379,) who was tried during the American war, for

striking a subaltern (Ensign Patrick) under his command. He was suspended from pay and allowances six months; and the court was further pleased to order that Ensign Patrick should draw his hand across the face of the lieutenant-colonel, before the whole garrison, in return for the insult he had received.

consideration the whole of the circumstances connected with the affair, and "to propose some mode of accommodating the dispute, by such explanation, acknowledgment and concession, on either part, as the occasion may seem to require, and which may, in the opinion of the court, consist with the honour of the parties, and their character as officers: and it was His Majesty's further pleasure, that, convening the parties before them, the court should exert its utmost endeavours to induce a reciprocal acquiescence in such honourable terms of accommodation, and to obtain from each a solemn engagement, that the difference should terminate and have no further consequences; to which end the court was armed with His Majesty's permission to use his royal name, authority and injunction; as also, if it should see occasion to impose a strict arrest upon both parties, until a report should be made of the matter to His Majesty."

The court met accordingly, and proposed such mutual apology as the case appeared to demand. Sir William Draper declared his readiness to regulate his conduct by the judgment of the court, but General Murray objected to the terms of the apology; whereon the court exacted from Sir William Draper a pledge of his honour that no adverse measures should originate from him, and remanded General Murray, subject to his arrest, which His Majesty directed to be made close, and which was not enlarged till he had pledged himself to the same effect with Sir William Draper. A correspondence, in the meantime, ensued between the judge advocate general and General Murray, in which the former, to induce the general to acquiesce in the decision of the court, stated that His Majesty entirely approved it; but the general's sense of duty to His Majesty was opposed by his repugnance to sign the requisite apology, as he was called on to express *concern*, which he stated he could not do with truth. The general, however, proposed a declaration which, in other respects, exceeded that prescribed by the court; but the words "I think it very unfortunate," superseded those, "I express my concern." This suggested apology was ordered by His Majesty to be laid before the court, "who, following the humane condescension of His Majesty," yielded their consent to its reception in the place of that dictated by them. The parties accordingly appeared

Proceedings of
court thereon.

before the court, and, upon their complying with its award, the matter ended.

Courts martial ascertain that the sentence can be carried into effect; must require a surgeon's certificate.

672. Courts martial,¹ before passing sentence of solitary confinement, hard labour or other punishment, should ascertain, in reference to the state of health of the prisoner, that the sentence can be duly carried into effect. With this view, a certificate,² from a medical officer, in his own hand-writing, according to a prescribed form, is to be required by the court, and attached to the proceedings.

Corporal punishment,

673. On awarding corporal punishment, which is restricted by the mutiny act to fifty lashes,³ it is customary to use the words, "*in the usual manner*:" the omission of the words "*on the bare back*," would not now convey a power of inflicting the punishment on the back and breech, which some fifty years since, it was held to do in aggravated cases of theft, misbehaviour before the enemy, and other unmanly crime.

terms to be observed in awarding,

imprisonment may be added.

674. The mutiny act⁴ gives courts martial the power to inflict corporal punishment and imprisonment, which they did not possess until corporal punishment was in every case remitted to fifty lashes in the year 1847.

Limitation of corporal punishment, according to a division of soldiers into two classes,

675. The Queen's regulations establish⁵ a classification of soldiers for the purpose of maintaining a distinction between the classes⁶ as regards liability to corporal punishment. All men on entering the army are placed in the first class, and are not, except for aggravated mutinous conduct, liable to corporal punishment. They continue in the first class unless they incur degradation into the second by the commission of certain crimes hereafter specified.

and a classification of offences:

676. For this purpose the offences committed by soldiers are classed under two distinct heads. Crimes under the first head are the following:—

"Absence from parade," "Drunkenness," "Riotous conduct in the streets," "Absence without leave from tattoo,"

(1) Queen's Reg. p. 225.

(2) Queen's Reg. p. 223. These certificates are granted under very stringent regulations. — Circulars, dated Horse Guards, 28th April, 1851; 10th September, 1847; also Circ. Mem., dated Horse Guards, 31st July 1848, and Army Medical Department Mem., dated 1st August, 1847.

(3) Queen's Reg. p. 227, Mut. Act, sec. 22.

(4) Mut. Act, sec. 23.

(5) Queen's Reg. p. 226-7.

(6) "The officer giving evidence as to the character &c. of a soldier under trial is to state the class to which he belongs."—Queen's Reg. p. 227. See § 626.

"Preferring frivolous complaints," "Disrespect to non-commissioned officers," "Striking a comrade," "Absence without leave," as defined by the [fifty-fourth] Art. of War, "Escaping from confinement," "Insubordination," "Making away with necessities," "Falsely imputing improper conduct to a superior," "Sleeping on post," depending on the circumstances and nature of the service.

I. Not liable to corporal punishment, except in the field.

Crimes under the second head are the following: — "Desertion," "Mutinous conduct," "Aggravated cases of insubordination and violence," "Drunkeness on duty, or on line of march," "Embezzling public money," "Stealing from a comrade," "Theft," "Designedly maiming," "Repeated acts of making away with necessities, arms, accoutrements, ammunition, &c.," "Other disgraceful acts showing vicious or unnatural propensities, and indecent assaults."

II. Subjecting men in the second class to corporal punishment.

677. "No man guilty of offences under the first head is to be subject to corporal punishment, except during time of war when the army is in the field. Men guilty of offences under the second head, being crimes of a very serious description, are, if in the second class, liable to, but are not necessarily to be condemned to corporal punishment. If, however, they are in the first class, they are, together with their punishment, which is not to be corporal punishment, to be disgraced and passed into the second class, when they will thenceforth, on the repetition of crimes under the second head, be liable to corporal punishment."

Regulation as to the disgracing of soldiers, and their liability to corporal punishment.

678. "Uninterrupted good conduct for one year may restore a soldier from the second to the first class; the degradation of a soldier and his restoration are to be managed according to these rules by the commanding officer of the regiment, and are to be duly notified in regimental orders."⁷ The proceedings of a court martial, which, notwithstanding this regulation, had inadvertently sentenced a prisoner to be degraded, were revised in order to enable them to correct this irregularity.

Courts martial do not direct the disgracing of a prisoner, which is a consequence of their sentence.

679. Subsequent circulars have directed that "a conviction of habitual drunkenness shall render a soldier liable to be degraded from the first to the second class;⁸ and that no soldier, who has been sentenced to the forfeiture of all

Further regulations as to the disgracing

(7) Queen's Reg. p. 227.

(8) Horse Guards, 31st May, '9

and restoration
of offenders.

advantages from *future* service is to be restored to the "first class" until after the expiration of one year from the date of his having been relieved from the consequences of that sentence.⁹

IMPRISONMENT.
Of officers,

simple impris-
onment;

of soldiers,
with hard labour
and solitary.

Extent not
limited, except
by regimental
courts martial,

and solitary, a
sentence of
which cannot
exceed three
lunar months in
one year, and
in no case four-
teen days with-
out an interval.

680. In those cases where courts martial award sentences of imprisonment upon officers, there is no authority, as has been already observed (§ 150), to add either hard labour or solitary confinement. But in all cases the imprisonment of soldiers may be with or without hard labour, and its duration, except in so far as it may be solitary, is limited by positive enactment,¹ only in the case of regimental or detachment courts martial, which cannot exceed a period of forty-two days.² The court may direct that the offender may be kept in solitary confinement for *any* portion or portions of *such* imprisonment not exceeding fourteen days at a time, or eighty-four days at different times in any one³ year, with intervals of not less than *such* periods of solitary confinement between the periods of solitary confinement.⁴ When any court martial whether general, garrison or district, or regimental, shall direct that the imprisonment shall be solitary only, the period shall in no case exceed fourteen days.⁵

In certain situa-
tions the court
is not to award
solitary confine-
ment.

681. In situations in which it may be impracticable to put in execution sentences of solitary confinement, the officer convening the court is required by the articles of war to give instructions to the court to that effect, and the court in awarding a sentence of imprisonment, is required to govern itself accordingly.⁶

Courts martial
do not fix the
precise periods
of solitary
imprisonment,

682. Courts martial by a circular, to which His Royal Highness the general commanding in chief has called the attention of courts martial,⁷ are recommended, in passing mixed sentences of imprisonment to leave it to the discretion of the governor of the military prison to appoint the precise period or periods at which the offender shall undergo the solitary confinement. They cannot of course expressly

(9) Horse Guards, 14th May, 1860.

(1) See § 685.

(2) Mut. Act, sec. 27. Art. War, 131.

(3) See § 682.

(4) Art. War, 131.

(5) Art. War, 123.

(6) Art. War, 124. This provision was introduced into the articles of war of 1844, at the suggestion of committee on military prisons.—General Report, p. 20.

(7) Circ. Mem. Horse Guards, 20th July, 1861.

advert to the contingency of the prisoner being committed to a military prison, not having the power in any case of selecting the place of imprisonment, but, with the view of leaving this discretion, they are required to do no more than "fix the number and length of the portions of the imprisonment for which the offender is to be kept in solitary confinement, and direct that intervals of not less duration than that required by the mutiny act and articles of war shall take place between the periods of solitary confinement."⁸

683. With reference to the aggregate amount of the periods of solitary confinement, which may be legally awarded, it is to be observed that the hundred and twenty-eighth article empowers a general, district or garrison court martial to sentence any soldier to imprisonment, with or without hard labour, and to direct that such offender shall be kept in solitary confinement for any portion or portions of *such* imprisonment (that is, of the imprisonment ordered by that sentence) "not exceeding fourteen days at a time nor eighty-four days in any one year." The limit of eighty-four days applies therefore only to the quantum of solitary confinement, to which an offender may be subject in the course of the imprisonment, by any one sentence, in any one year, not by the aggregate of sentences in any one year. "That is," in the words of the judge advocate general, whose opinion is here quoted, "the limit of eighty-four days has not any reference to any antecedent imprisonment within the space of the same year."⁹

684. No provision having been made in the military

and are to adhere to a prescribed form of sentence.

The limitation as to solitary confinement has not any reference to any antecedent imprisonment, within the space of the same year.

(8) Circ. Mem. 26th July, 1845.

(9) Extract. — Letter dated 29th August, 1844, to a major-general commanding a district in Ireland, with reference to the proceedings of a district court martial which had sentenced a soldier to solitary confinement in the terms of the mutiny act, and which was re-assembled and directed to revise its proceedings, as it appeared by the record of former convictions on the face of the proceedings that the prisoner had already undergone three months' solitary confinement within the year, the major-general adding "by the mutiny act, a soldier can only be kept in solitary confinement, eighty-four days, which he has under-

gone already."

The judge advocate general "ventured to differ as to the construction to be put on the clause of the mutiny act," and pointed out that the sentence being legal the proper course, as it appeared to him, was for the major-general,—if he was of opinion that the solitary confinement or any part of it, ought not to be inflicted,—not to order a revision, but to remit the solitary confinement in whole or in part.

A copy of this letter was placed before district courts martial, subsequently held in the command, for their information and guidance.

Courts martial are also prohibited from awarding simple imprisonment, when they have reason to suppose that the prisoner will be committed to a military prison.

Course to be pursued when medical certificate given in qualified form, and form of award.

Duration of imprisonment in ordinary cases, not to exceed six months,

or two or three months for minor offences.

prisons, the government of which is administered under instructions from the secretary at state for war, for the imprisonment of soldiers who are not to be employed, and the only employment contemplated by these instructions being what is termed "hard labour," his grace the late commander-in-chief recommended¹ that courts martial should refrain from sentencing to simple "imprisonment" prisoners proposed to be committed to such prisons, and confine their awards to "imprisonment with hard labour" or to "solitary confinement" or to a combination of these two punishments. His grace in a subsequent circular further recommended that in all cases, where the certificate of the medical officer "states that the prisoner is unequal to labour requiring much bodily exertion, courts martial should nevertheless award '*imprisonment with such labour as in the opinion of the medical officer of the prison, the prisoner may be equal to*,' it being understood that there are various descriptions of light labour, to which such prisoners may, conveniently, be subjected in the military prisons without injury to their health."²

685. There is not, as already observed, any positive enactment as to the extent of imprisonment, which may be awarded by a general or district or garrison court martial. The Queen's regulations point out that "The nature and extent of punishment, especially of solitary confinement and hard labour, must of course vary according to *locality*, and particularly according to *climate*, as extremes of heat and cold equally prescribe caution. The duration of imprisonment for all ordinary offences is to be limited to six months, and for the minor offences, such as "absence without leave," unaccompanied by aggravating circumstances, or "drunkenness," not occurring on duty, the imprisonment awarded by a district court-martial is not to exceed two or three months' duration."³ The sentence is now usually expressed

(1) Circ. Mem., 13th August, 1845.

(2) Circ. Mem., 31st July, 1848; Queen's Reg p. 226.

(3) Queen's Reg. p. 225. The committee on military prisons, in their report, detail their reasons for recommending that the actual detention of a soldier in prison should not exceed six months, except by sen-

tence of a general court martial.—General Report, p. 34.

The *maximum* imprisonment which can be awarded under the recent "criminal law consolidation and amendment acts," (chap. xxv.) is for a period of *two years*.

It may be mentioned here that the regulations explain that "unless speci-

in days, even when for an exact multiple of months, following the precedent supplied by the articles of war, which now invariably specify days in designating the period of punishment.

686. Courts martial, when they have recourse to imprisonment, should be very careful in framing the sentence to confine themselves to the terms of the act of parliament. The mutiny act having given authority to superior and commanding officers to appoint the⁴ place of imprisonment, the court are not to notice it in their sentence; nor, (except in those cases where they may pass a sentence of imprisonment on an offender, already under sentence of imprisonment, to commence at the expiration of his imprisonment to which such offender shall have been previously sentenced,⁵) are they to award imprisonment commencing at any specified time, the articles of war providing that every term of imprisonment under the sentence of a court martial, whether original or revised, shall be reckoned as commencing on the day on which the original proceedings and sentence shall have been signed by the president.⁶

Courts martial have no power to fix place of imprisonment,

or time of its commencement, except in case of offenders imprisoned under a previous sentence.

687. Two punishments, distinctly and essentially differing in their nature, cannot be awarded but by express authority to that effect in the mutiny act or articles of war. A court martial cannot therefore award corporal punishment and penal servitude, imprisonment and penal servitude, for the same offence, nor can a regimental court martial award corporal punishment and imprisonment;⁷ but a court martial may, in every case left discretionary, sentence an officer to loss of rank and to be reprimanded; and, in like manner,

Cumulative punishments may in certain cases be awarded for the same offence;

fied to mean 'calendar,' the word *month* will always signify a 'lunar' month of twenty-eight days." In this respect official usage is directly opposed to the sense in which "month" is to be understood in acts of parliament, as by 13 and 14 Vict. c. 21 s. 4 the word "month," is deemed and taken "to mean calendar month, unless words are added showing lunar month to be intended."

(4) See under "Execution of sentence," § 774.

(5) Mut. Act, sec. 28; Art. War, 140. Before the year 1860 this provision did not extend to a further

award of imprisonment in any cases of *subsequent sentence*, except those only where the offender may have been found guilty of a *subsequent offence*. Although the mutiny act and articles of war have been altered to meet this case, "previous offences" continue to be particularized in the margin of the act.

(6) Art. War, 141.

(7) General and district or garrison courts martial were authorized to award imprisonment, in addition to corporal punishment, in the year 1847. See § 674.

non-commissioned officers, reduction of;

acting non-commissioned officers not to be awarded reduction.

Sentences of stoppage of pay

to replace arms, &c.;

to make good damage, &c., the amount of which having been ascertained by the court, must be specified in the sentence.

Sentence to make good loss and damage incurred by embezzlement.

Forfeiture of pay, when imperative.

non-commissioned officers, may, and must be reduced⁸ to the ranks, if sentenced to undergo imprisonment or other punishment to which the custom of the army forbids that a non-commissioned officer, as such, should be subjected.⁹

688. It may be noticed that it is unnecessary to adjudge a lance corporal or acting bombardier to be reduced to the rank of a private soldier. An award of this description by a court martial was disapproved by General Lord Hill when commanding in chief.

689. The hundred and thirty-second article specifies the cases in which an offender may be placed under stoppages until he has made good any loss, destruction, damage or expense which may have been proved against him; and the hundred and thirty-third article very distinctly points out the manner in which the sentence is to be framed. In the case of arms, clothing, instruments, equipments, accoutrements or regimental necessities, the court is by its sentence to direct that the stoppages shall continue till the cost of replacing the same be made good. In the case of any other loss, destruction, damage, or expense, the offender is to be placed under stoppages to such an amount only as has been ascertained by evidence and proved to the satisfaction of the court, and which they distinctly specify in their sentence.¹

690. It must also be borne in mind, that whenever an offender has been convicted of any offence in breach of the eighty-fourth article, the court must be careful in framing their sentence, to follow the provisions of the seventeenth section of the mutiny act in that respect.

691. "In cases in which a court martial awards the forfeiture of pension on discharge, the forfeiture of the additional pay should *invariably* form a part of the award and be specified in the sentence."²

692. There does not appear to be any occasion to recapitulate the remaining punishments which courts martial

(8) Queen's regulations (p. 226) direct that the sentence of *reduction*, being "obligatory," should precede the award of any other punishment.

(9) For the special punishments applicable to non-commissioned officers, see § 160.

(1) A Circular Memorandum, of the 9th May, 1851, called the atten-

tion of courts martial to the corresponding provisions in the mutiny act and articles of war of that year. "courts martial having in several instances adhered to obsolete and irregular forms of framing sentences of stoppages of pay."

(2) Circular, Horse Guards, 31st July, 1838; and see § 227 [9].

may award, as they are elsewhere mentioned; but it may be observed also that a court martial is not competent to *award* positively that the offender be discharged with ignominy, but only to *recommend* that he be so discharged;³ but such recommendation cannot for desertion (*Art. 52*), or disgraceful conduct (*Art. 85*), as provided by the articles of war, be joined to the sentence, except the forfeiture of all claim to pension form part thereof; but this provision is not appended to the hundred and nineteenth article which enables a general court martial to make this recommendation in any case.⁴

"Discharge with infamy" can only be recommended when in conjunction with the sentence of forfeiture of pension.

693. The mutiny act for the present year for the first time enacts that "a court martial recommending that an offender be discharged with ignominy may also recommend that he be marked on the right breast with the letters B.C., and such recommendation may legally be carried into effect by the military authorities."⁵

The court may superadd a recommendation to mark an offender so discharged.

694. When the sentence of the court is entered on the proceedings, they are signed by the president, who is required to "annex the date of his signature"⁶ in every case. It is customary for the judge advocate to add his signature to the proceedings of general courts martial.

The president signs the proceedings and sentence.

695. A certificate, in the handwriting of the medical officer, according to a prescribed form, showing the state of health of the prisoner, and whether he has or has not been marked D, is invariably to be attached to the proceedings.⁷

attaches a medical certificate,

696. When the court abstains from sentencing a deserter to be marked D, a separate letter, stating the reasons, and signed by the president, is also to be appended. The same course is to be followed when a court abstains from sentencing a soldier to forfeiture, under the fifty-second and eighty-fifth articles of war of pay or pension, medals, annuity or gratuity.⁸

and, where the court does not avail itself of certain powers, a letter containing their reasons.

(3) *Art. War*, 52, 85, 119.

(4) By the 171st article every soldier "who has been discharged with ignominy" thereupon forfeits all advantages from his former service; and it would therefore appear that this provision is made with reference to cases where the recommendation of the court is not carried into effect. See note § 227.

(5) *Mut. Act*, sec. 26.

(6) *Queen's Reg.* p. 221, "Care is to be taken that sufficient space is left immediately below the signature of the President for the signature and remarks of the confirming authority." *Queen's Reg.* p. 223.

(7) *Queen's Reg.* p. 223.

(8) *Queen's Reg.* p. 223. The 52nd and 85th articles correspond to the 28th section of the mutiny act of 1859.

Proceedings of
general courts
martial for-
warded for
approval by the
judge advocate,

and by the
president of
other courts.

697. The proceedings of general courts martial held at home are transmitted by the officiating judge advocate to the judge advocate general. Abroad they are in like manner forwarded to the officer vested with authority to confirm the sentence. The proceedings of district or garrison courts martial are transmitted "duly sealed up" by the president to the confirming authority direct, except in those counties where the troops report direct to head quarters, when they are transmitted through the senior officer on the spot to the adjutant-general for the approval of the commander-in-chief. The proceedings of regimental courts martial are laid before the commanding officer, by the president; and those of a detachment court martial in like manner before the senior officer on the spot.⁹

The president
reports the
close of the
proceedings.

698. Where there are no more prisoners to be tried, and the officer by whose orders the court was assembled, is not also the confirming authority, the president reports that the proceedings are closed, and the court adjourns (§ 524) until further orders.¹

Recommendation to Mercy, and Remarks by Court.

Recommendation to mercy;

when sentence
is discretionary,
not to be embodied in proceedings.

and preferably
signed only by
the president;

699. Should the court see fit to recommend the prisoner to mercy, such recommendation, when the punishment is discretionary, ought not to be embodied in the proceedings, but appended under the signature of the president, and signed by him, which is the general practice; or it may be similarly appended and signed by each individual member desiring a favourable consideration of the prisoner's case;² or the recommendation may be conveyed in a letter³ from the president, and accompany the proceedings.⁴ In a general order, publishing the sentence of a court martial held at Exeter, 1814, on Lieutenant Edward Hancox, of the 11th regiment of foot, the Prince Regent, adverting to the recommendation of the prisoner to mercy by the court, observed, "the prevalence of such recommendations by courts martial, in the body of their proceedings, *where the sentence*

(9) Art. War, 125, 126, 129, 131.
Queen's Reg. p. 223-4.

(1) As to return of officers to duty,
see § 525.

(2) See James's Tytler, p. xxii.

(3) G. O. Nos. 523, 399.

(4) G. O. No. 524.

is discretionary with the courts, is not only irregular in itself but most embarrassing to the sovereign, who is alone to judge whether the circumstances of the case, when considered with the general good of the service, can admit the exercise of mercy in the confirmation of a sentence."⁵

Recommendation to mercy;

Where the punishment is not discretionary with the court, a recommendation to mercy may be inserted with the sentence;⁶ if the motive which actuates the court be at all referred to, the allusion should be brief and incidental. Where the recommendation is not inserted with the sentence, the reasons which prompted the court to recommend the prisoner should be distinctly and fully set forth; but the court should carefully avoid to point out to His Majesty "any particular mode in which the prisoner may be deemed worthy the royal clemency."⁷

when not discretionary, may be inserted with the sentence; stating motive for recommendation;

but should not suggest any particular exercise of clemency.

700. Where circumstances appear to call for remark, courts martial do not confine themselves to the mere record of their finding and sentence. Courts martial have sometimes, in acquitting a prisoner, entered at some length into the motives of such acquittal,¹ or given an opinion generally of the conduct of the accused.² It would obviously be as incorrect to *honourably* acquit an officer of a charge not affecting his honour, as it would be illegal, and contrary to every principle of equity, to find a greater degree of guilt than that charged (§ 624).

REMARKS BY COURT.

Motive of acquittal and opinion of prisoner.

701. It is competent to a court martial to remark on the conduct of a prosecutor, as connected with the charges, or arising in the course of the proceedings.³ In the case of Lieutenant-colonel Keating, where the court martial animadverted on the personal ill-will and animosity of the prosecutor, Captain Frye, and the frivolous and vexatious nature of the charges, the general officer who confirmed the sentence characterized the remarks of the court as "judicious and appropriate:" and, on the proceedings being submitted to the king, His Majesty's sentiments thereon were made known by the general order of the 14th February, 1809: "His Majesty considers that the finding and sentence of the court, as

Court may remark on the conduct of prosecutor.

Case of Lieut.-colonel Keating.

(5) G. O. No. 328.

(6) G. O. Nos. 334, 340, 415, 423, 507, 525, 526, 531, 534.

(7) G. O. No. 303.

(1) G. O. No. 236.

(2) G. O. No. 396.

(3) G. O. Nos. 379, 423, 482.

approved and confirmed by Major-general Jones, were fully warranted by the circumstances which appeared upon the trial, and are strictly conformable to the justice of the case. His Majesty has been pleased to notice and confirm in a more especial manner, the appropriate censure passed by the court martial upon the motives which fully appear on the face of the proceedings to have marked the conduct of the prosecutor." ⁴

Case of
Captain Wathen.

702. Courts martial, in acquitting, have sometimes remarked, in very strong terms of disapprobation, on the conduct of the prosecutor, and in reprehension of occurrences, prejudicial to discipline, which have appeared on their minutes. In the case of Captain Wathen, of the 15th Hussars, who was tried on six charges, preferred at the instance of his commanding officer, Lieutenant-colonel Lord Brudenell, and was honourably acquitted of *each* and *all* the charges, the court proceeded: " Bearing in mind the whole process and tendency of this trial, the court cannot refrain from animadverting on the peculiar and extraordinary measures which have been resorted to by the prosecutor. Whatever may have been his motives for instituting charges of so serious a nature against Captain Wathen (and they cannot ascribe them *solely* to a wish to uphold the honour and interests of the army), his conduct has been reprehensible in advancing such various and weighty assertions to be submitted before a public tribunal, without some sure grounds of establishing the facts. It appears in the recorded minutes of these proceedings, that a junior officer was listened to, and non-commissioned officers and soldiers examined with the view of finding out from them, how in particular instances the officers had executed their respective duties; a practice in every respect most dangerous to the discipline and the subordination of the corps, and highly detrimental to that harmony and good feeling which ought to exist between officers. Another practice has been introduced into the 15th Hussars, which calls imperatively for the notice and animadversion of the court,—the system of having the conversations of officers taken down in the orderly room without their knowledge, a practice which cannot be considered

(4) G. O. No. 180.

otherwise than revolting to every proper and honourable feeling of a gentleman, and as being certain to create disunion and to be most injurious to His Majesty's service." His Majesty was pleased to approve and confirm the finding of the court. The general order proceeded: "Although it would appear, upon an attentive perusal of the whole of the proceedings, that some parts of the evidence might reasonably bear a construction less unfavourable to the prosecutor than that which the court have thought it their duty to place upon them, yet, upon a full consideration of all the circumstances of the case, His Majesty has been pleased to order that Lieutenant-colonel Lord Brudenell shall be removed from the command of the 15th Hussars."⁵

703. Courts martial have sometimes declared charges frivolous, vexatious and groundless,⁶ and sometimes malicious,⁷ and not originating in a desire to promote the good of the service,⁸ but proceeding from warmth of temper and ignorance,⁹ insubordination, animosity, resentment, revenge, or conspiracy.¹⁰

Court may
animadvert on
charges and
their origin,

704. Courts martial may also, in acquitting a prisoner, animadvert on the tone of his defence, or on any violence of language in respect to the character of a witness.¹ So, also, courts martial have frequently declared that, in their opinion, the prosecutor was actuated by no illiberal or improper motive,² but a sense of duty and regard for the benefit of the service,³ or that his conduct has been laudable and

or on intemperate
defence of
prisoner,

(5) G. O. No. 529.

(6) G. O. No. 196.

(7) G. O. No. 209.

(8) G. O. No. 292.

(9) G. O. No. 238.

(10) G. O. Nos. 236 and 291. The general court martial held on the 25th June, 1804, most honourably acquitted Col. Stewart, of the 43rd Regiment; and in their remarks characterized the conduct of the prosecutor, Captain Nathaniel Jekyll, of the same corps, as malicious in endeavouring to calumniate the character of his commanding officer. His Majesty causing it to be intimated to Captain Jekyll that he had no further occasion for his services, he brought an action against the President (Sir John Moore) in the Court of Common Pleas, but the court

held that the words complained of were a part of the judgment of the court, and that no action could be maintained upon them. — G. O. 7th July, 1804. *Jekyll v. Moore*, 2 New Reports, C. P. 341.

(1) G. O. 8th Nov., 1845. "The Court having acquitted the prisoner, Lieutenant William Augustine Hyder, of the 10th Royal Hussars, of the charge preferred against him, cannot refrain from animadverting in the strongest terms of disapprobation on the violent, coarse, and uncalled-for language which he, the prisoner, has had recourse to in his defence, in allusion to the character of Silvester Olliver, Esq."

(2) G. O. No. 243.

(3) G. O. No. 250.

and impartial
conduct of pro-
secutor.

honourable,⁴ or regular and impartial : ⁵ such remarks by the court have generally been produced by strong assertions or insinuations of the prisoner, not supported by evidence, and have occasionally accompanied an acquittal, at other times a conviction.

Court may re-
mark on wit-
nesses.

Case of Captain
O'Doherty.

705. Courts martial occasionally animadvert on the conduct of witnesses ; and that they are justified in doing so, appears from many general orders promulgating sentences. On the trial of Captain Theobald O'Doherty, of the 91st Regiment, in January 1825, " His Majesty was pleased to command, that in consequence of the serious animadversions passed by the court upon the conduct of Captain Richardson, and Brevet-major Creighton, of the 91st Regiment, which animadversions appear to be amply borne out by the minutes of their evidence upon the trial of Captain O'Doherty, these officers shall be required to send in their resignations, with a view to their retiring from His Majesty's service, by the sale of their respective commissions." ⁶

On causes lead-
ing to the trial,

and on points
connected with
discipline, affect-
ing persons not
before the court.

706. Courts martial have sometimes observed, in terms expressly charging perjury,⁷ or falsehood,⁸ on the mode in which witnesses have delivered their testimony ; sometimes they have implied censure,⁹ at others praise.¹ Courts martial have also animadverted on the causes which have led to the trial, implicating the conduct of individuals not before the court ; ² and that although they may not be amenable to military law.³ The execution of this duty must always be considered as a task of a very refined and delicate nature ; the measure ought only to be resorted to in extreme and particular cases, which admit of no possible explanation, as it seems opposed to the most obvious principles of justice, that any man should be censured unheard, unless indeed he withdraw from enquiry, or purposely keep out of the way in order to withhold evidence which he may be competent to afford. Courts martial also occasionally observe on any irregularity

(4) G. O. No. 397.

(5) G. O. No. 296.

(6) G. O. No. 489.

(7) G. O. No. 320.

(8) G. O. Nos. 259 and 286.

(9) G. O. Nos. 451, 483, 506, 533.

(1) G. O. No. 243.

(2) G. O. Nos. 447 and 465.

(3) It has been observed, (Kennedy

on General Courts Martial, p. 164,) that each individual of a court martial would, by censuring inconsistencies and prevarication by witnesses in a civil capacity, be liable to an action for defamation. Cases may, however, arise, affecting civilians and calling for an allusion to facts. That in the G. O. No. 447 seems to be one.

to the prejudice of discipline, committed by persons not before the court, but connected incidentally with the subject of trial:⁴ on the trial of an officer charged simply with striking another in the mess room, the revision of a sentence has been ordered for the express purpose of ascertaining, the senior officer present, when the affray happened; the sentence of the court being afterwards approved by His Majesty:⁵ but this could not now happen, because courts martial, when revised, are restricted from the examination of witnesses or the reception of additional evidence in respect to the charge.⁶

707-709. It is incumbent on a court, that its animadversions, as affecting witnesses or third parties of any description, should be specific, not general: this appears from the observations of His Majesty on the promulgation of the sentence on Ensign Stanton of the eighth Foot. The court had noticed "the unjustifiable conduct of assistant surgeon Brown, in regard to the prisoner, as it appeared in evidence." "His Majesty expressed much regret that he (the assistant surgeon) should in any instance have subjected himself to the severe censure which the general observation conveys; but His Majesty at the same time remarked, that the court martial, impressed with such sense of his conduct, ought to have specified in direct terms, and in a manner which might have been acted upon, those parts of the assistant surgeon's behaviour which drew from them so pointed an animadversion."⁷

Animadversions
not to be ge-
neral;

case arising on
the trial of
Ensign Stanton.

(4) G. O. Nos. 447, 450, 465.

(5) G. O. No. 452.

(6) Mut. Act, sec. 18.

(7) G. O. Horse Guards, 28th Sept.
1805.

CHAPTER XVII.

Decision upon Sentence.

Sentences of
courts martial
inoperative till
confirmed.

710. THE sentence of a general court martial, as of all other military courts martial, is unlike the sentences of courts of ordinary criminal jurisdiction, inasmuch as these are complete when pronounced. It is inoperative until confirmed by the sovereign, or by an officer duly authorized under the sign manual¹ or in India by an officer, who without other authority, "the article of war to the contrary notwithstanding" is empowered by the courts martial act.²

Warrants operative abroad
convey a power
to execute, mitigate or remit
any sentence,

except in cases
of commissioned
officers cashiered or sentenced to death,

when the proceedings are
submitted to
Her Majesty, or

in India to the
commander-in-chief;

711. The warrant to officers in command *abroad*, except in India, empowering them to convene general courts martial, includes a power to cause sentences, passed by such courts, to be put into execution, or to suspend, mitigate or remit the same, except in the case of commissioned officers, adjudged to suffer death or penal servitude, or to be cashiered, dismissed or discharged, in which cases, as in any other instances wherein the officer, to whom the warrant may be directed, shall think proper to suspend the execution of any sentence, the proceedings of the court are transmitted to the judge advocate general, who lays them before Her Majesty, and afterwards sends them to the commander-in-chief, or, in his absence, to the adjutant-general, for Her Majesty's decision thereon.³ In India the commander-in-chief is authorized to carry into execution sentences by

(1) Art. War, 125. Before, and for some years after, the revolution of 1688, confirmation by superior authority was not necessary. The court, having finished its deliberation, the prisoner was brought in, and sentence was pronounced in the name of the court martial. This custom still obtains on naval courts martial; and, for some reasons, it is to be regretted that it should have been superseded in the

army, especially where the prisoner is acquitted of the whole of the charges preferred against him.

(2) 7 Vict., c. 18, s. 1.

(3) See the warrant, Appendix, II. The judge advocate general received and communicated the sovereign's decision until 1806. See also the circular, 22nd August, 1806; War Office, Reg. (1807) p. 561.

which commissioned officers are adjudged to suffer death, or penal servitude, or to be cashiered,⁴ and the cases of officers sentenced to death, penal servitude or cashiering are referred to him, by the generals commanding the several presidencies, as to the Queen, from other foreign stations.

712. A limitation to the power given to the officers, in command on foreign stations, to execute the sentence of courts martial, arises also from the hundred and twenty-fifth article of war, which provides that no sentence of death shall be carried into effect in any colonial possession until it shall have been approved in the Queen's by the civil governor or person administering the civil government. In all other cases the sentence of courts martial is carried into execution without the previous sanction of the civil governor or person administering the government.⁵

and except that where there is a civil governor, capital punishment cannot be executed till approved by him.

713. The hundred and forty-sixth article, which regulates the trial of civil offences in India, when there is no competent civil judicature, provides that in every case where a sentence of death or penal servitude shall be awarded or a sentence of death shall be commuted to penal servitude under its provisions, the concurrence of the governor-general in council, or governor in council, or governor of the presidency is requisite, before such sentence, whether original, revised, or commuted, can be carried into execution.

The concurrence of the governor-general, &c., in India, necessary in sentences for capital offences.

714. In the hundred and forty-fifth article, which provides for the trial by courts martial in places within the Queen's dominions beyond the seas (excepting India) where there is no *competent* civil judicature, there is the following clause: "We hereby reserve to Ourselves the power, in all cases "where a sentence of death shall have been pronounced on "any officer or soldier by any general court martial as

In cases of capital sentences on soldiers for civil offences,

(4) See Warrant — Appendix, III. This power was for the first time inserted in the warrants issued to the late Marquis Hastings, appointed governor-general and commander-in-chief in 1813. A similar warrant was for the first time issued to the general or officer commanding in chief in China in the year 1858.

The only other instance where the like full powers have been given to a British Commander of the Forces, since the Duke of Marlborough, was when

the allied army proceeded to the East, and, as it was thought desirable to assimilate Lord Raglan's powers as much as possible to those of the French commander-in-chief, the clause excepting officers was omitted in the warrant for holding general courts martial, which was then issued to him "or the officer commanding the forces."

—See note, § 1254.

(5) Instructions to governors, &c., 30 December, 1824. Queen's Reg., p. 370.

"aforesaid, instead of causing such sentence to be carried into execution, to order the offender to be kept in penal servitude, or to be imprisoned, with or without hard labour, for such period of time, as on consideration of all the circumstances of the case, shall seem to Us to be most just and fitting." A clause to this effect was for the first time added to the articles in the year 1832, and as no official explanation of its intention was afforded, and there were then no precedents to refer to, it gave rise to much discussion. It seemed that this clause, if taken in its most obvious sense, and without referring to other provisions by which it must be construed, would have the effect of prohibiting the infliction of capital punishment awarded, in the case of a soldier, by any court martial held under the article, unless approved by Her Majesty.

From a comparison of provisions,

715. On the other hand, a previous provision of the article declares that "any officer or soldier," if "found guilty, shall be liable, in the case of an offence which if committed in England, would be capital, to suffer death, or such other punishment as by the sentence of such general court martial shall be awarded: no such punishment nevertheless, to be carried into effect until such officer commanding in chief as aforesaid" (that is, who shall appoint the court martial) "shall have confirmed the same." A previous article (*the* 125th) points out that the power of confirming the sentence of a general court martial is delegated under the sign manual. In the warrants under the sign manual issued to commanders of the forces abroad, in pursuance of the provisions of the articles of war, the sovereign, after this reservation was inserted in the article, continued to authorize the execution of sentences of courts martial at their discretion, except upon officers adjudged to suffer death, or cashiering, or in other instances wherein they may think it proper to suspend them.⁶

It follows that the commander of the forces may carry them into immediate execution.

716. It seemed, therefore, that a legitimate, although a less obvious, sense in which this clause might be taken, was this—that Her Majesty "*reserves to herself*,"—not the decision

(6) See Warrant, Appendix, II. There is a further restriction from the execution of the sentence of death by

courts martial being suspended until approved, in Her Majesty's behalf, by the civil governor.—See § 712.

in every case where sentence of death may be adjudged, but, — “*the power*” of commuting the capital punishment in all cases which may come before her; specially providing that the proceedings *shall* be laid before her in the case of officers and authorizing the suspension of the sentence in any other instance at the discretion of the commander of the forces. At all events, under this article, general officers under trying circumstances have acted under this impression, and have carried capital sentences into execution, without referring them home, and, so far as is known, their proceedings have not been called in question.⁷

717. General officers, at home and in the Channel Islands, have, by the warrant directed to them, no power to execute, mitigate, or remit the sentence of any general court martial; the proceedings are transmitted by the deputy judge advocate to the judge advocate general, direct, in order that he may lay the same before Her Majesty for her royal consideration, and afterwards send them to the commander-in-chief, or, in his absence, to the adjutant-general, for Her Majesty's decision thereof.⁸

718. General or other officers in command, who have authority to approve and confirm the sentences of courts martial, are required to be particular in stating, at the end of the proceedings, their determination in each case, and the manner in which the case is disposed of.¹

Warrants operative at home and in the Channel Islands have no power to execute or remit :

proceedings are laid before Her Majesty.

The decision of the confirming authority is to be written at the end of the proceedings.

(7) The author expressed his opinion at the time, that the reservation, made by the recent addition to the article did not tend to any alteration in the law. “His Majesty previously had the power of ordering the substitution of transportation for death, but hitherto he has been pleased by warrant to authorize general officers abroad to suspend for his royal consideration, to mitigate, or remit, or carry into execution, the sentence of death by courts martial; except, as before noticed, with respect to officers, and on stations where there may be a person distinct from the commander of the forces especially delegated to represent his royal authority. Such then, it is imagined, is the law at the present time; no other conclusion can be

attained, after comparing together each part of the article of war, after referring to the warrants for assembling courts martial, the instructions to governors, the customs of the service, and the dictates of common sense, as applying to the case itself.”—2nd Edition, 1835.

(8) See Warrant, Appendix, I.

(1) Queen's Reg. p. 224. This was the established custom before the insertion of this order in the regulations. Lieutenant-colonel Robertson, of the 8th Foot, was tried, and found guilty, amongst other charges, of “permitting sentences of regimental courts martial to be carried into execution, without affixing his approval to the proceedings of the same.” G. O. No. 450. 15th Sept., 1810.

*Revision.***REVISION.**

may be once
ordered.

719. The authority by which a general court martial may be confirmed is competent to order a revision; but no finding, opinion or sentence, given by any court martial, and signed by the president, is liable to be revised more than once.² Before 1750, this limitation did not exist; the sentence might have been returned for revision any number of times; the fourteenth section of the mutiny act is not, therefore, as some have imagined, an enabling, but a restrictive clause. The power of the superior authority, to order a revision of the finding or sentence of a court martial, is, in some degree, analogous to that of a judge in a court of civil judicature, who may remand a jury for the reconsideration of their verdict; but this power in the judge is not limited to one revision.

Reasons for re-
vision in every
case embodied
in proceedings.

720. The reasons of the confirming authority for reassembling the court are occasionally written at the end of the original proceedings, and the practice, which previously existed, of annexing to, or embodying in, the proceedings, either the original, or a copy, of the letter or order directing the revision of the finding or sentence, was enforced by an order of the commander-in-chief, who directed "that in all cases in which a court martial shall be reassembled for the purpose of revising its proceedings, the letter, order, or memorandum containing the instructions to the court, and the reasons of the revising authority for requiring a revision of the finding or sentence, or an authentic copy thereof, may be attached to and form part of the proceedings of the court."³

Orders for re-
assembly of
court, how pro-
mulgated.

721. The proceedings of the court martial are returned to the officiating judge advocate (or to the president of minor courts martial) either direct, or through the officer, by whose order the court may have been convened, and the court reassembles according to a notification in orders; or sometimes by a circular from the officiating judge advocate.

No witness ex-
amined on,

722. The mutiny act of 1830 declared that *no witness*

(2) Mut. Act, sec. 14.

(3) Circ. Mem., 12th December, 1844; Queen's Reg. p. 223.

shall be examined, or *additional evidence* received by a court martial on revision;⁴ but the words "in respect to any charge on which the prisoner then stands arraigned" were added in 1860, and have been held to authorize the reception, on revision, of evidence as to previous convictions, as the provisions of the mutiny act respecting additional evidence refer only to such evidence as tends to prove or disprove the offence set forth in the charge.

with reference
to the finding
of the court.

723. Where a court martial has decided to hear certain statements in defence, and not to admit the reading of parts of a printed book, "which the prisoner insisted upon his legal right to urge as a justification against the charges," such statements and extracts, not being otherwise than "decent and proper;" and the prisoner has, in consequence, withdrawn his address, and declined to make any defence (at the same time protesting against the decision of the court, and subsequently submitting the point to the judge advocate general, the general officer in command having declined to interfere upon the question), a revision has been ordered, upon the express grounds that the trial had "*not been regular, and that the sentence of the court could not be sustained*;" the rejected document has been directed to be admitted and inserted, and the prisoner's defence to be heard throughout; the judge advocate general remarking, that "the decision of the court, 'that the prisoner was at liberty to refer to the chapter and verse of any book, but not to read extracts from religious works,' would seem to be arbitrary, and inconsistent with itself; for when matter is admitted, by permission to refer to it, to be pertinent, it is of the essence of any defence, that the party should be permitted also to explain the application of such matter to his own particular case."⁵

Court revised,
prisoner having
been unduly
restricted in
defence,

matter ex-
punged by court,
ordered to be
admitted.

(4) Mut. Act, sec. 14. Before the first alteration of this clause in 1830, courts martial, on revision, never, with propriety, received evidence or examined *fresh* witnesses: but particular questions had been *put by the court* to a witness *previously* examined, with a view to clear up any doubt which might be suggested to exist as to the import of the testimony recorded; and to this extent only, that is, as it may bear on the questions thus put, was

the party interested permitted to re-examine. But much difficulty often arose from this guarded re-examination of witnesses on revision; and its entire prohibition was, therefore, considered a judicious innovation. An incidental advantage is the immediate and certain release of the witnesses, on the adjournment of the court for approval.

(5) Letter of judge advocate general, Trial of Lieut. Dawson, p. 83.

For similar reasons, a revision has been ordered where the court had directed certain parts of a prisoner's address, "containing religious matter, to be expunged, as being quite foreign to the charge," the prisoner protesting against the act of the court, by observing, "that he should reserve to himself the liberty of referring to higher authority," but proceeding with his defence.⁶ In both of the cases referred to the prisoners merely read their defence and did not attempt to produce evidence on revision, though no law *then* existed to prevent it. These cases tend to show the importance of the due admission or rejection of a prisoner's address, and much more of legal evidence; if *the sentence could not be sustained*, because a prisoner was improperly restricted in his address, much more would the rejection of legal evidence render it inoperative.⁷

Matter previously recorded cannot be expunged:

summary of duty of court on revision.

Revision on account of evidence irregularly received.

724. A court martial, on revision, cannot *alter* or obliterate any part of the previous proceedings, or expunge from the record any testimony, however illegally it may have been admitted: its duty in such case is, as the word *revise* indicates, to review and reconsider its judgment, opinion and sentence; which may obviously require a reconsideration and weighing of the recorded testimony, with a view to correct, by an insertion of a second opinion, any error in the sentence which may have arisen from inadvertence, or misconception of law or of the customs of the service.

725. Where a court martial had received evidence as to previous convictions, subsequent to the defence, but prior to the finding of guilt, it has been ruled that, as there did "not appear any irregularity till after the defence," a revision might be ordered, and the court enjoined "to dismiss from their consideration any part of the evidence admitted subsequent to the defence; thereupon deliberating upon the guilt or innocence of the prisoner, and passing sentence accordingly." It was also observed, on the same case, that the inadvertent approval of the sentence, under such circumstances, *would have* rendered the proceedings altogether invalid.⁸

(6) Trial of Captain Atchison, p. 16.

(7) See case of *Musprat*, § 919.

(8) Judge advocate general as to district court martial on Private Rush-ton, 95th regiment.

726. Any illegality as to the constitution of the court, or any defect in its composition, cannot be amended on revision; much less can an illegality as to the charge be remedied.⁹ Such flaws must obviously invalidate the proceedings to such a degree as to render the sentence innoxious to the prisoner, as must any illegal assumption or jurisdiction over a crime or person; but it cannot be admitted that every such capital error must *necessarily* so entirely annihilate the court as to expose the prisoner to trial by another court martial. The statute enacts that no officer or soldier, *being acquitted, or convicted* of any offence, shall be liable to be tried a second time, by the *same or any other* court martial, for the same offence.¹ A court which has exceeded its jurisdiction may still, in itself, be a legal court, though not legally competent to entertain a particular charge, or any charge against an individual of privileged rank, for the trial of whom a court specially composed is enjoined, as in the case of a field officer. But a trial having, by inadvertence, illegally taken place before such *intrinsically* legal court, and an acquittal or conviction having been once recorded, the enactment above quoted must preclude any further trial. If indeed the court be of itself illegally constituted, as for instance, by assembling under an extinct warrant, by using an oath, other than that prescribed, or by omitting the appointed oath, it is, in fact, no court at all; and, therefore, whatever opinion any number of officers, so assembling otherwise than as required by the law, may be pleased to express in writing, it cannot be termed the acquittal or conviction of an officer or soldier by a court martial: their acts would be mere nullities.—The illegal act of a legal court, and the act of an assembly of officers constituting no court whatever, must, without any further commentary, be seen to be totally different.²

Illegality in the composition or constitution of courts martial not to be amended on revision, nor illegality in charge

but must invalidate the sentence.

An offence entertained by a legal court, offender cannot be again tried.

(9) On a reference made to the judge advocate general, he replied, "I entirely concur with Major-general Ross in thinking the charge so absolutely defective in all legal respects, that it was impossible to confirm a finding of guilty thereupon. I need not add, that I consider any revision out of the question, as no sentence of punishment could be properly adjudged or enforced upon a charge not supportable in law."—*The Right Hon. Sir J.*

Beckett, Bart., to the Judge Advocate on a District Court Martial, 18th March, 1830.

(1) Mut. Act, sec. 14.

(2) With reference to a different opinion on this head, which the author had observed in Kennedy on General Courts Martial, (page 37), he took occasion to remark that he could not see any grounds on which to alter his judgment; much less could he coincide in the opinion, that should any

Confirmation.

Sentence of
general courts
martial con-
firmed by the
Queen.

727. The decision of the Queen upon the proceedings of general courts martial, which have been previously laid before Her Majesty by the judge advocate general, is received and communicated by the commander-in-chief or in his absence by the adjutant-general.

Sentence con-
firmed, but not
approved;

728. When courts martial have, on revision, adhered to the judgment first pronounced, the opinion and sentence have sometimes been *confirmed*, but *not approved*, the legal effect of which differs in no degree from an approval, except perhaps in the case of detachment general courts martial, it being declared³ by the article and by the mutiny act, that the sentence shall not be carried into effect, until *approved and*⁴ confirmed. The opinion and sentence of a court martial,

illegality take place in passing sentence, or in the course of the proceedings, (of a legally constituted court), and vitiate them, and consequently cause the discharge of the prisoner, that, "such proceedings are not to be considered as a trial of the prisoner, not having been legally conducted," and that: "A new charge may therefore be preferred against the prisoner, and a new court assembled to investigate it, and in this case the prisoner cannot plead a former trial or acquittal or conviction in bar of his impending trial." The author can but adhere to the opinion above given, that the illegal act of a *legally constituted court*, though it vitiates the proceedings so as to render the sentence inoperative, cannot have the effect of subjecting the prisoner to a second trial for the same offence by the same or any other court martial; and consequently if brought to trial under such circumstance, a prisoner may rightfully plead the former acquittal or conviction in bar of his impending trial. The author had supposed that the mutiny act was sufficiently clear, but he is enabled to refer, in support of the construction which he has placed on it, to the following opinion given, with reference to the proceedings of a garrison court martial, in December, 1828, by Sir J. Beckett, when judge advocate general: "The circumstance of Ensign Brown

(whose property the prisoner is accused with an attempt to steal), sitting as a member of the court, appears to me to be more open to observation; indeed, I think it so objectionable that I acquiesce in the propriety of the punishment awarded by the court being remitted in this case, and as *the prisoner cannot legally be brought to trial a second time upon the same charge*, I would suggest that the prisoner be ordered to his duty forthwith."—*Author*, 1835.

In the following singular case the same principle was acted upon. An officer belonging to a Queen's regiment in India was brought to trial and sentenced to be cashiered, but it appearing that the court, although convened by competent authority and otherwise regular in its proceedings, was wholly composed of officers in the then Company's service, which was not legal under the existing mutiny act, the sentence was not carried into effect, and the prisoner was released from his arrest and returned to his duty.

(3) Mut. Act, sec. 12. Art. War, 126.

(4) The words "*duly approved*" in other clauses have been replaced by the word "*confirmed*," and the words "*approved and*" have been elsewhere expunged, and it may therefore be very possible that in this case they may have been overlooked.

on other occasions, have been *disapproved, and not confirmed*; the effect of which is to nullify the sentence: but, as before stated, not to the extent of exposing the prisoner to a second trial.

sentence
disapproved.

Commutation and Remission.

729. The mutiny act provides that in all cases, whether of officers or soldiers, where the punishment of death has been awarded by a general court martial or detachment general court martial, it shall be lawful for the Queen, or, if in any place out of the United Kingdom or British Isles, for the officer commanding in chief the forces there serving, instead of causing such sentence to be carried into execution, to order the offender to be kept in penal servitude for any term not less than four years, or to suffer such term of imprisonment, with or without hard labour, and with or without solitary confinement, as shall seem meet to Her Majesty, or to the officer commanding as aforesaid. The articles of war repeat this provision as regards officers commanding-in-chief abroad.⁵

Judgment of
death may be
commuted
for penal
servitude or
other punish-
ments,
by the Queen,

or the officer
commanding
in chief abroad.

730. The mutiny act provides, and the articles of war repeat this provision, as far as relates to commanders-in-chief abroad, that in any case where a sentence of penal servitude has been awarded by a general or detachment general court martial, it shall be lawful for Her Majesty, or, if in any place out of the United Kingdom or British Isles, for the officer commanding in chief the forces there serving, instead of causing such sentence to be carried into execution, to order that the offender be imprisoned, with or without hard labour, and with or without solitary confinement, for the same or a lesser term.⁶

A sentence of
penal servitude
may be com-
muted for im-
prisonment.

731. Where an award of any forfeiture, or of deprivation

(5) Mut. Act, sec. 16. Art. War, 143. The power of commuting a sentence of death was granted by the mutiny act of 1831 to the officer commanding in chief in India; in 1854, it was extended to the commander-in-chief of forces serving out of Her Majesty's dominions, and a corresponding clause was in that year added to the warrant of Lord Raglan, (§ 711 [4], 1254) as it had been previously, and still is, to the warrant of the com-

mander-in-chief in India (§ 1258). In 1860, this power, as at present, was extended to all cases beyond seas, as were also the existing powers of commuting penal servitude. These powers apply in all cases beyond seas, but they continue to be reiterated in the articles (145-7) which provide for the trial of civil offences by courts martial.

(6) Mut. Act, sec. 20. Art. War, 144.

Forfeitures, when combined with penal servitude which has been commuted, may be dealt with as expedient.

Power to commute a sentence of cashiering.

Commutation by superior officers illegal, except in the cases of death or penal servitude;

and in cases of corporal punishment,

which may be commuted to imprisonment, either wholly or in part, the remainder to be inflicted in the prison.

of pay, or of stoppages of pay has been added to any sentence of penal servitude, Her Majesty, or, if in any place out of the United Kingdom or British Isles, for the officer commanding in chief Her Majesty's forces there serving, in the event of the sentence being commuted for imprisonment, may order such award of forfeiture, deprivation of pay, or stoppages of pay to be enforced, mitigated, or remitted, as may be deemed expedient.⁷

732. The mutiny act also provides that it shall be lawful for Her Majesty, "*in all cases whatsoever*," instead of causing a sentence of cashiering to be put in execution, to order the offender to be reprimanded, or, in addition thereto, to suffer such loss of army or regimental rank, or both, as may be deemed expedient.⁸

733. It is particularly to be observed that the only power given to officers, by the warrants under the sign manual, is to carry into execution, suspend, mitigate, or remit the sentence of a court martial; it does not authorize them to alter the species of such punishment. This rule applies to officers confirming the sentences of minor courts martial. They may remit the whole or any part of a sentence, with the exceptions hereafter noticed; but cannot, even with the consent of the prisoner under sentence, commute or change any penalties awarded by the court, excepting only in the case of corporal punishment.

734. The mutiny act and articles of war provide that in all cases⁹ where corporal punishment forms the whole or any part of the sentence, the confirming authority may commute such corporal punishment to imprisonment not exceeding forty-two days, with or without hard labour, and with or without solitary confinement; or may mitigate it, either by reducing the number of lashes, or by awarding, instead of such sentence, an imprisonment for any period not ex-

(7) Mut. Act, sec. 21.

(8) Mut. Act, sec. 24. This provision was added to the mutiny act of 1837, and extends not only to the offence of false musters, which was then peremptorily punished by cashiering, under the provisions of the section to which it was annexed, but also to all offences under the articles and to offences under the seventh-fifth and eighty-seventh sections, where the ca-

shiering is a consequence of conviction by the civil power.

(9) Mut. Act, sec. 24. Art. War, 122. The article also provides that the solitary confinement awarded in commutation of a sentence of corporal punishment shall in no case exceed seven days at a time, with intervals of not less than seven days between each period of such confinement.

ceeding twenty days, with or without hard labour, and with or without solitary confinement, and corporal punishment to be inflicted in the prison, not exceeding twenty-five lashes.

735. A partial exception to the power of officers to remit¹ the penalty arising from convictions by courts martial, arises in cases where the offender has been convicted of desertion; or of felony or any crime which if committed in the United Kingdom, would be felony; or of absence without leave. The forfeiture of all advantage as to pay whilst serving and pension on discharge is necessarily consequent on conviction of desertion or felony and cannot be restored but by the approbation of Her Majesty obtained, on the special certificate of the commander-in-chief, and signified through the secretary for war.² Also in the case of a soldier who has been convicted either of desertion or of absence without leave "the pay of the day or days during which he was in a state of desertion or during his absence without leave" is forfeited on conviction,³ but it is provided, that the secretary at war may order or withhold the payment of the whole or any part of the pay of any officer or soldier during the period of absence by these and other causes.⁴

Forfeitures, on conviction of desertion, felony, and absence without leave, cannot be remitted;

may be restored on the application of the commanding officer.

736. In the case of conviction of any offence, other than desertion, or amounting to felony, when the punishment or forfeiture awarded has been wholly remitted, the offence is considered to have been forgiven, and the offender entitled to be relieved from all the consequences of his conviction and placed in all respects as if no trial had occurred, and it is not therefore recorded in the defaulter book.⁵ The conviction however appears in the court martial book, and, legally, may be given in evidence on any subsequent trial of the person so convicted.

No conviction, if sentence remitted, is entered in defaulter book, except of desertion or felony, where forfeiture of service is independent of sentence, but all stand against the soldier in court martial book.

737. The remission of forfeitures for habitual drunkenness has been already (§ 226) adverted to; and the articles of war provide that when any person has been sentenced by a court martial to stoppages of pay, it shall be lawful for the commander-in-chief with the concurrence of the secretary of

Remission of forfeitures and stoppages.

(1) As to remission of imprisonment after committal, see § 790.

(2) Art. War, 171. See § 794.

(3) Art. War, 175.

(4) Mut. Act, sec. 59. Art. War, 178.

(5) Circ. Mem., Horse Guards, 10th Jan., 1849.

state or war, to remit the whole or any portion of such stoppages in any case where such remission may appear to be conducive to the good of the service.⁶

Promulgation of Sentence.

Sentences confirmed by the Queen.

738. In the case of general courts martial, upon which Her Majesty's pleasure has been taken, the decision of the sovereign is usually communicated in a letter to the general or other officer by whose authority the court martial was assembled, which contains a copy of the charges, finding and sentence, the proceedings being deposited in the judge advocate general's office.

How communicated :

739. No communication is made to the troops through general, district, or regimental orders relative to the result of the trial, except in such cases as the commander-in-chief signifies his special commands to that effect; and in all such cases the communication is made by a general order addressed to the army at large.⁷

when promulgated in orders.

740. The usage in all ordinary cases is for the general officer to communicate to the officer commanding the regiment to which the prisoner belongs, a copy of the official communication of the result of the trial which he receives from the adjutant-general or military secretary.

Capital punishment.

741. In cases of capital punishment, the confirmation, and, where required, the approval of the civil governor, (§ 712-3) is promulgated, as in ordinary cases, or a special warrant, enjoining the execution of the prisoner, is addressed to the officer commanding the division, brigade, or garrison, as it may happen.

Promulgation of sentence abroad, and of proceedings.

742. The sentences of general courts martial abroad are promulgated in general orders or otherwise at the discretion of the general officer; and under peculiar circumstances the sentences of district and regimental courts martial are entered in orders. In the case of those general courts martial which are disposed of by commanders of the forces, and of all district or garrison courts martial, the proceedings, when the minute of the confirming authority has been duly made,

Proceedings confirmed by superior officers.

(6) Art. War, 135.

(7) Letter, Adjutant-general, Horse Guards, 14th Nov., 1839.

are forwarded to the prisoner's immediate commanding officer, and, after they have been promulgated, are to be returned by him as soon as possible to the officiating judge advocate, or the president of the court, as the case may be, in order to their being by them transmitted to the judge advocate general in London, as required by the mutiny act.

743. In the year 1842 the original proceedings of a court martial, after having been confirmed by the general officer, were lost in their transit to the officer commanding the prisoner's regiment: the judge advocate general, in reply to the adjutant-general, gave his opinion, that the best evidence of the proceedings, the finding sentence and confirmation, having been lost, it was necessary to resort to secondary evidence, which, in this instance, was furnished by a memorandum transmitted by the general officer and by the testimony of the president of the court: his letter concluded as follows:

Proceedings being lost, the next best evidence must be resorted to,

"Under these circumstances this is amply sufficient, and, I think, the sentence should be promulgated in conformity with the memorandum, and should be carried into execution, as it would have been if the original proceedings were forthcoming."⁸

and the sentence may be carried into effect.

744. Where no minute exists, the same principle still applies;⁹—that in the absence of the best evidence, resort must be had to the next best, which can be procured. It was officially decided,¹ with reference to the case of a soldier in the grenadier guards, that "if the president have a distinct personal recollection of the sentence, and of the substance of the charge, and the confirming authority certifies also that the proceedings were confirmed by him, the sentence may be carried into effect."

(8) Extract — Letter, dated 7th Dec., 1842.

(9) It is almost unnecessary to add that these precedents do not apply to the proof of previous convictions when given in evidence against a prisoner, who has been found guilty; in which case, the law points out what secondary evidence shall be sufficient, and there would not be the same occasion, in the interests of justice and of discipline, to relax the strict rule.

In addition to the chances of unavoidable accident, many cases will

suggest themselves to officers of experience, where, if there was an impression that the sentence of a court martial could not be carried into effect, unless the original proceedings or precise proof of their exact tenour were forthcoming, it would give rise to many successful attempts to make away with the requisite evidence, which it would be almost impossible to prevent, and most difficult to bring home to the guilty party.

(1) Letter, dated 30th Sept., 1845.

Review of Sentence.

The sovereign alone competent to review the sentence of courts martial.

Superior courts have power to examine the acts of members.

745. There is no court of law in which any appeal against the sentence of a general court martial can be brought; nor in which the sentence can be reviewed; but the privy council is competent to review the sentence of courts martial and actually did so, in the remarkable case of a naval court martial on Lieutenant Frye, of the Marines, in 1743.² It belongs to the Queen alone, or to such officers as she may depute, to abrogate or confirm the sentence:³ but the power of the superior courts to enquire into the conduct of the president and members, or any individual member, of a court martial, against whom there may be alleged an undue exercise of authority, any excess of jurisdiction, or any illegality of proceeding, has been evinced by their proceedings in several instances. Any of the superior courts will at all times grant a writ of *habeas corpus*, where probable ground is shown that a military prisoner, either before or after trial, is held in illegal custody.⁴ The court of Queen's Bench will not grant a criminal information for any act unless it be committed from corrupt or vindictive motives; if an illegal act be committed merely by ignorance or mistake, the applicant may seek his remedy by indictment

(2) 1 M^cArthur, 268. In the army at the present day, not only are the proceedings of all general and district courts martial subject to examination by the judge advocate general, when transmitted to his office; but, by means of the monthly returns of courts martial (§ 749), the sentences of regimental and other courts martial are brought under the notice of the commander-in-chief, and are subjected to a careful scrutiny.

(3) See the opinion of Lord Erskine, given in the letter relative to Musprat (§ 919). See also the decision of Lord Loughborough in the case of Serjeant Grant.—1 *H. Blackstone's Reports*, 69.

In Michaelmas term, 1833, Mr. John Waller Poe, late a lieutenant in the 55th regiment, who had been dismissed His Majesty's service by sentence of a court martial, held at Chatham, in the October preceding, made an applica-

tion in the Court of King's Bench for a prohibition of restraining the execution of the sentence. The lord chief justice (Denman) observed that supposing the case of *Grant v. Gould* (see before, § 63) to furnish some argument for a proceeding of this nature *before* the execution of the sentence, still it is impossible to discover what the court could prohibit *after* execution. He also remarked in delivering the judgment of the court that the king had the exclusive, uncontrolled prerogative of dismissing any soldier or officer whom he pleased, with or without a court martial, and what the king had power to do, independent of any enquiry, he plainly might do, even though the enquiry should not be satisfactory to a court of law.

(4) See the case of Captain Douglas, § 364; and Lieut. Allen, § 783.

or may bring an action for damages in respect to any injury he may have sustained.

746. The eighty-ninth section of the mutiny act recognizes the liability of members and ministers⁵ of courts martial to actions at law, in respect of any sentence, or of anything done in virtue of or in pursuance of any sentence: but restricts such proceedings to the courts of record at Westminster or in Dublin, or to the court of session in Scotland; and secures treble costs to the defendant, in case he obtain a verdict, or the plaintiff become nonsuited, or suffer any discontinuance of the action. It may, at first sight appear that six months is the time limited for bringing an action against a member of a court martial; but a more attentive consideration of the eighty-ninth section, and a comparison of it with the old mutiny act,⁶ will show that the limitation applies to proceedings by virtue of the act for the penalties declared by it.

To what courts proceedings for damages are restricted,

treble costs to defendant.

Time not limited.

747. The 11 & 12 Will. 3, c. 12, provided that governors and commanders in chief may be prosecuted and punished by the court of King's Bench, or by a special commission in England, for acts of oppression or crimes committed in colonies and plantations beyond the seas. And by the 42 Geo. 3, c. 85, it is enacted, that if any person whatever,

Officers are liable to be proceeded against in England for offence committed abroad.

(5) This includes not only provost marshals, keepers of prisons, &c., but also superior and other officers, and any persons *ministerially* concerned, in the execution of, or giving effect to, the sentence, or in the safe custody of the prisoner. Lieut. Allen, of the 82nd regiment, (having been released on a writ of *habeas corpus*, under the circumstances mentioned, § 783) obtained a verdict with 200*l.* damages in the Court of Common Pleas, on the 10th July, 1861, for false imprisonment, against H.R.H. the Duke of Cambridge, who, it was admitted, was answerable for the act of the adjutant-general who gave the order for his committal. He had previously obtained a verdict with 50*l.* damages against the governor of the military prison at Weedon, the learned judge who tried the case explaining to the jury in his charge that "The subordinate officers of the great ministers of government were liable to an action for their wrongful acts. There was, however,

a great difference in this from many actions of this kind in which the wrongful imprisonment was under an arrest for some crime which the plaintiff had not really committed. Here the plaintiff had been lawfully convicted and sentenced to imprisonment. It was for them to say what the amount of damages should be, not treating the case as one of an arbitrary outrage on the liberties of the subject, and at the same time not regarding it quite so lightly as it had been represented by the counsel for the defendant."—*Times*, March 4, 1861.

(6) Mut. Act (1828), secs. 155, 156, 157 and 158. The mutiny act of 1829 (sec. 16), provided that the demand for a copy of the sentence of courts martial "shall be made, and any proceedings thereon had, within the space of three years from the date of approval or other final decision upon the proceedings before such general court martial."

employed in the service of His Majesty, in any civil or military station, office, or capacity whatever, shall commit any crime or offence in the execution, or under colour, or in the exercise, of his office, he may be tried for it in England in the court of King's Bench upon an indictment, or upon an information exhibited by the attorney-general.

Checks provided against abuse of power.

Responsibility of confirming authority.

Proceedings recorded.

Returns of courts martial, which are

intended "to afford as much general insight as its nature will admit,"

748. Undue exercise of authority by regimental or other courts martial, apart from the corrective power of the common law courts, may, at any time, be made the subject of enquiry by superior military authority. Not only does a great degree of responsibility attach to the officer who confirms the sentence, but with a view to the prevention of abuse or irregularity, the whole proceedings of regimental and detachment courts martial are required to be recorded in the books of each regiment, signed by the president, and countersigned as approved by the commanding officer, and the original proceedings of every general and district or garrison court martial are transmitted to the judge advocate general.

749. A monthly return of courts martial, made up to the first of each month, and containing the names of all men who have been tried by courts martial during the preceding month, is transmitted to the general officer under whose orders the corps is serving, and, through him, to the adjutant-general of the forces, showing, according to prescribed form, the length of service of the offender; whether tried before, and if so, when, where, how, the nature of the offence, and what sentence; the crime, date and place of commission; the description of court martial by which tried, whether general, district, or regimental; the date and place of trial; the original, and (if revised) the revised, finding and sentence; by whom and when confirmed; punishment inflicted; punishment remitted; and the name of officer in command of the regiment: a column is also left in the return for remarks, in which the permission of the superior authority to try grave offences by an inferior court is to be noticed, any special directions or any remarks made by the confirming authority, are to be inserted, and in which the general officer is directed⁷ to notice any irregularities which

(7) Circular to General Officers, 4th May, 1831.

may have occurred, and to state what steps he has taken thereon, and also to explain any special case in which he may have thought it right to sanction a departure from the established regulations. These returns are then rigidly gone through at the Horse Guards, and informality or irregularity is brought to the notice of the parties concerned, or otherwise redressed, as the justice of the case may require.

and are to be carefully examined by the general officer, are afterwards scrutinized at head quarters.

750. The regulations also point out, that it is the duty of the general or other officer commanding, to transmit to the adjutant-general, together with his report of the state of any troops disembarking in any station, a return of courts martial which may have been held during the voyage.^s

Special cases of courts martial on board ship.

751-9. At each half-yearly inspection general officers are required to report in the established form of confidential reports, under the head of courts martial: whether any irregularity has occurred in the proceedings of courts martial, or in the execution of the sentences awarded by them: whether the sentences appear to have been proportionate to the crimes; and — whether the necessity of frequent punishment has been superseded by wise measures for the prevention of crime, and by the zeal and assiduity of the officers in their different stations to carry them into effect, and to maintain the discipline of the regiment by kind and considerate treatment of the soldiers.

Confidential reports by generals inspecting.

CHAPTER XVIII.

EXECUTION OF SENTENCE.

Execution of
sentence,

760. SOME remarks have already been offered as to the mode of carrying into execution the sentence, when treating of the award of courts martial, in addition it may be observed, that as one great end of punishment is the prevention of crime by example — *ut ad omnes metus, ad paucos pœna perveniat*,— capital and corporal punishments are rendered, in this respect, as extensively useful as possible, by the publicity which attends the execution. They are carried into effect in the presence of the division, brigade, garrison, or regiment, or of the guards and picquets of the several regiments in camp or garrison, as the nature of the court martial and of the charge, and as the convenience of the service may dictate.¹

In case of
capital punish-
ment by
shooting.

761. In cases of capital punishment by shooting, great ceremony is ordinarily observed; an execution party, consisting of ten or twelve men, commanded by a serjeant, is usually ordered from the prisoner's regiment, and placed under the orders of the provost marshal.² The troops to witness the execution being formed on three sides of a square, the prisoner, escorted by a detachment, is brought on the ground. The provost marshal heads the procession, followed by the band of the prisoner's regiment, drums muffled, playing the dead march in Saul; the execution party comes next; then four men, bearing on their shoulders the prisoner's coffin; and, usually attended by a chaplain, he then follows; the escort last brings up the rear. The procession passes down the front of the three faces of the square, facing inwards;

(1) Mitigated sentences of corporal punishment are an obvious exception. See hereafter, § 769.

(2) Warrants to general officers, enabling them to carry the sentence

into execution, also authorize them "to appoint a provost marshal, to use and exercise that office as it is usually practised in the law martial."—§ 1255, 1263.

brigades or regiments being in line, or in contiguous columns, by shooting; as their numbers and the nature of the ground may dictate. On the arrival of the procession on the flank of each regiment, the band of that regiment plays the dead march in Saul, and continues till the procession has cleared its front. On arriving at the open face the music ceases; the prisoner is placed on the fatal spot marked by his coffin: the charge, finding, and sentence of the court, and the warrant or order for execution are read aloud; the chaplain, having engaged in prayer with the condemned, retires; the execution party forms at six or eight paces from the prisoner, and receives the word from the provost marshal. If its fire should not prove instantaneously effectual, it is said to be the duty of the provost marshal to complete the sentence of the court with his pistol. Sometimes the fire of a file or two is reserved, to be prepared for this painful occurrence. After the execution the troops usually move past the body in slow time. Death, by hanging, is executed with less ceremony; the troops witnessing the execution being formed in square on the gallows as a centre; the charge, sentence, and warrant are read, and an executioner, under the direction of the provost marshal, performs his office.

Capital
punishment
by hanging.

762. "The usual manner" of inflicting corporal punishment,³ is as follows: the brigade, garrison, regiment, or detachment, being under arms, is formed in some retired spot, often in the ditch of an outwork of a fortified place or fort, to receive the prisoner, who is brought by an escort to the centre; the commanding officer, or the brigade major, the town major, or adjutant, as the case may be, proceeds to read aloud the charge, sometimes the proceedings, but invariably the sentence of the court and the approval; the prisoner being uncovered, and advanced a pace or two in front of the escort. The culprit is then directed to strip to the waist, and

Corporal
punishment,
infliction of,

(3) "Corporal punishment" is now used in the mutiny act and articles of war *exclusively* of the punishment of flogging. In the earlier mutiny acts and articles of war it was properly used as including the punishments, (among which was imprisonment,) to which an offender was subjected in his person, as distinguished from his purse. A trace of the now obsolete usage was

still to be observed in the articles of war of the first few years of the present century:—"the penalty if a soldier sell or spoil his arms, &c.," under the 3rd Art., XII Sec., being to "undergo weekly stoppages of his pay, and besides suffer imprisonment *or other* corporal punishment" at the discretion of the court martial.

Corporal
punishment,

prolonging
time of, not
justifiable.

Order of His
Majesty on
irregular
infliction of.

under ordinary circumstances, is tied to a machine termed a triangle, which consists of three legs or poles, connected by a bolt at top, and separated about four feet at bottom; to two of its legs a bar is affixed, at a convenient distance, that the prisoner's chest may rest against it, his ancles being tied to the legs; halberds were sometimes rigged out for the purpose; whence has originated the common saying, "bringing a man to halberds," as synonymous with bringing him to corporal punishment; at other times the prisoner is lashed to a gun-wheel, and receives on his bare shoulders twenty-five lashes, from the drummers of infantry, or the trumpeters and shoeing smiths of cavalry, in succession, till the punishment is completed, or interrupted by order of the commanding officer; the drum or trumpet major counts each lash, or rather directs it, the lash not being inflicted till it is numbered; between each, a pause equal to three paces in slow time takes place, which is marked by the time taken to circle the cat round the head, or formerly, in some cases, by taps of the drum. A commanding officer is not justified in prolonging the infliction beyond the usual time; and charges have been grounded upon the non-observance of such caution.⁴ No punishment is to be inflicted but in the presence of the surgeon or of the assistant surgeon in case of any other indispensable duty preventing the attendance of the surgeon.⁵ Should any symptoms arise which indicate the propriety of suspending the infliction, it is the duty of the medical officer to report to the senior officer on the parade, who directs accordingly. The cat-o'-nine-tails consists of a drum stick, or handle of wood of similar length, having fixed to it nine ends of common whipcord; a larger description of cord, or the substitution of a rope,⁶ could not be justified; each end is about sixteen inches long, and knotted with three knots, one being near the end: the drum-major sees that the ends are not entangled during the infliction, so as to produce a more serious blow than was intended, but that they are disengaged from time to time, and, if necessary, washed in water. A previous preparation of cats, by steeping them in brine and washing them in salt and water during the punishment,

(4) G. O. No. 450.

(5) Queen's Reg. p. 227.

(6) See case of Governor Wall, § 1109
[5].

has been made the subject of a charge against a commanding officer; and although the officer referred to (Lieutenant-Colonel Bayly, of 98th regiment) was acquitted "of all knowledge of, or participation in, the cruel and unprecedented practices of steeping the cats in brine, and of washing them with salt and water, during the infliction of the punishments;" yet His Majesty, ever alive to the reputation of the army, and desirous of tempering with mercy the unavoidable severity of military punishment, was pleased to command that "the admonition" to which he had "been sentenced by the court, should be communicated to that officer, accompanied by the expression of His Majesty's regret and displeasure, that punishments deemed necessary in their nature to the maintenance of discipline, and legally authorized, should have been inflicted in any corps in so cruel and unprecedented a manner as the evidence on the face of the proceedings clearly establishes to have been the case in this instance, and that so unquestionable a proof should have been afforded of neglect of duty on the part of an officer in command of any regiment or detachment of His Majesty's troops, as is too clearly chargeable upon Lieutenant-Colonel Bayly, and as is justly so held by the court, when an occurrence so prejudicial to military discipline, and tending so manifestly to bring the army into disrepute, could have been preconcerted without his knowledge, and afterwards take place without his notice, in the depôt under his immediate command."

Corporal
punishment.

763. The commanding officer is in all cases responsible that the punishment is inflicted according to the custom of the service. His late Majesty declared, upon the occasion of the irregularity above referred to, "that whatever may be the opinion or sentence of a general court martial, His Majesty will continue to require that officers will be held responsible for what passes in regiments under their command." The order making known His Majesty's sentiments on the subject, also contains the following passage: "It matters not whether such irregularities proceed from design, inattention, or ignorance, on the part of the commanding officer. Whatever may be the cause, it is equally clear, that the officer who may either authorize or allow such acts, or during whose command

Infliction of
sentence.

Corporal
punishment.

such acts may take place, is in no way fit to be entrusted with the charge of a body of troops; and it is, therefore, the imperative duty of the general commanding in chief, whenever such a case is brought forward, to make a special report of it for the serious consideration of His Majesty."⁸

infliction of, by
right and left-
handed
drummers.

764. Although many years since right and left-handed drummers were sometimes employed indifferently, yet it is obvious that this must have occasioned a vast increase in the degree of pain beyond that produced by punishing with right-handed drummers alone. It would therefore not be acting up to the letter of a sentence, which prescribes corporal punishment in the *usual manner*, to adopt a mode of infliction which greatly enhances the suffering, and which was at no time *uniformly* and *invariably* practised.⁹

Second
inflictions of
corporal
punishment.

765. The practice of completing an awarded corporal punishment at a time subsequent to the first infliction, if the culprit was unequal to bear the whole at once, in the judgment of the medical officer in attendance, had been for many years discontinued, but was first forbidden by the regulations in 1837.¹

Military
punishment
not to be
inflicted on
Sundays,

766. The attention of the general commanding in chief having been called to the punishment of a soldier of the 11th Hussars on a Sunday, his lordship remarked that it was well known that it is not the practice of this country to carry the penal sentences of the law into execution on that day, neither was it the practice of the army whether employed abroad or at home; and Lord Hill desired it to be clearly understood that the sentences of military courts are not to be carried into execution on Sundays, excepting in cases of evident necessity, the nature of which it could not be requisite for him to define.²

except in cases
of evident
necessity.

767. The sentence of corporal punishment, upon a prisoner, under such sentence for any offence, who may

(8) G. O. No. 511.

(9) These observations, and those which were offered in former editions as to flogging on the breech, are happily obsolete, and may by some be deemed trifling; but the subject of them was one of great consequence to those soldiers who were exposed to corporal punishment, and the author felt very strongly that they were also connected with the best interests of

the service, if he judged rightly of the feeling of the soldiers, (which no one who knows soldiers, can doubt) on witnessing the modes of punishment upon which he animadverted, and which, though at one time justified, or rather palliated, by custom, were never frequent.

(1) Queen's Reg. p. 228.

(2) G. O. No. 553, 22nd April, 1841, Queen's Reg. p. 228.

effect his escape before it has been carried into effect, is to be inflicted upon his apprehension, and before putting him on his trial for breaking from confinement, desertion, or other subsequent offence, as the case may be, it being apparent that the non-infliction of corporal punishment, under such circumstances, might have a tendency to encourage attempts to escape by offenders under such sentence.³

Corporal punishment.

Prisoner under sentence of, and escaping, subject to on return.

Cautions before carrying into effect.

768. The strictest attention is enjoined to the precautionary measures to be taken in all cases to ascertain the state of the prisoner's health before any infliction of corporal punishment, the superior or commanding officer being ordered to require the medical officers to make the most minute inspection of every soldier under sentence of corporal punishment, whether it be awarded by general, district or garrison, regimental or detachment court martial, before he gives orders that the sentence be carried into execution.⁴

769. The power of the confirming authority to commute or mitigate corporal punishment to imprisonment has been before noticed (§ 734). When prisoners are to undergo a mitigated sentence of corporal punishment within the prison, the commitment must contain a special order for such punishment with a certified extract of the sentence of the court.⁵ Corporal punishment in a military prison is administered according to the usual practice of the service.⁶ The infliction of such mitigated punishment, in no case exceeding twenty-five lashes, must be attended by a visitor, the governor, and medical officer (whose instructions thereon, for preventing injury to health, are to be obeyed⁷), but warders and prisoners are not required to be present, unless deemed specially expedient.⁷

Mitigated sentence of;

commitment must contain order for; inflicted in military prisons.

770. The mutiny act points out the course to be adopted when it is intended that any sentence of penal servitude shall be carried into execution for the term of the sentence or for any shorter term; or when, by Her Majesty's gracious order, or in any place out of the United Kingdom or the British

Execution of sentences of penal servitude,

(3) An answer to this effect was given on a reference to the highest authority in the year 1844.

(4) Circular. Horse Guards, 10th August, 1846.

(5) Rules and Regulations for Military Prisons, War Office, 12th April, 1851; Rule 149.

(6) *Ib.* Rule 13.

(7) *Ib.* Rule 15.

Penal servitude. Isles, by the order of the officer commanding in chief the forces there serving, a sentence of death has been commuted (§ 729) to penal servitude. In the United Kingdom a notification⁸ is made in writing by the officer commanding in chief, or in his temporary absence by the adjutant-general, or when there shall not be any commander-in-chief, then "by the secretary at war or his deputy," to any judge of the Queen's Bench, Common Pleas, or Exchequer in England or Ireland, who is thereupon enjoined to make an order for the penal servitude of the offender in conformity with such notification, as such judge is authorized to do by any Act in force touching the penal servitude of other offenders. In India⁹ and other parts of Her Majesty's foreign dominions a similar notification is made by the officer commanding Her Majesty's forces at the presidency or station where the offender may come or be, or in his absence by the adjutant-general for the time being, to some judge of one of the supreme courts of judicature in the East Indies, or the chief justice, or some other judge, as the case may be, in any part of Her Majesty's foreign dominions, who makes order for the penal servitude or intermediate custody of the offender, which order being duly notified to the governor of the presidency or colony, he is required to cause such offender to be removed or sent to some other colony or place,¹ or to undergo his sentence within the presidency or colony where the offender was so sentenced, or where he may come or be in obedience to the directions for the removal and treatment of convicts from time to time transmitted from Her Majesty through a secretary of state. In the Ionian Islands and elsewhere out of Her Majesty's dominions,² the officer commanding is empowered

(8) Mut. Act, sec. 18. By an addition made to this section in the present year, it is provided an order made by a judge in Ireland that the offender shall be kept in penal servitude in England shall be in all respects as effectual in England as though such offender had been convicted in England, and the order had been made by any judge of the Queen's Bench, Common Pleas, or Exchequer in England.

(9) Mut. Act, sec. 19.

(1) "Much inconvenience and delay

having been caused by military convicts arriving from abroad unaccompanied by the required legal order for their commitment, His Royal Highness the general commanding in chief desires that, whenever soldiers are sent home for the purpose of undergoing penal servitude, officers commanding will be very particular in ascertaining that the judge's order of committal is given to the officer in charge of such prisoners."—*Circ. Mem. Horse Guards*, 12th June, 1861.

(2) Mut. Act, sec. 19.

to make an order *in writing for the penal servitude* or intermediate custody of an offender, who is liable by virtue of such order to be imprisoned and kept to hard labour and otherwise dealt with under the sentence of the court in the same manner as if he had been sentenced to be imprisoned with hard labour during the term of his penal servitude by the judgment of a court of competent jurisdiction in the place where he may be ordered to be kept in such intermediate custody, or in the place to which he may be removed for the purpose of undergoing his sentence of penal servitude.

Out of the Queen's dominions.

771. The term of penal servitude commences on the day when the original sentence and proceedings are signed by the president, except in those cases where the court (§ 667) awards penal servitude to commence at the expiration of a previous sentence of penal servitude or imprisonment. The convict continues in military custody until the order (§ 770) is received.

Commencement of term.

772. Officers cease to belong to the service upon the confirmation of a sentence of penal servitude.³ Soldiers are no longer to be discharged on being handed over to the civil power, as formerly. His Royal Highness, the general commanding in chief, with the concurrence of the secretary for war, has desired, by a circular,³ which was ordered to be read at the head of every corps, that "soldiers, who may be convicted by courts martial, or by the civil power, and sentenced to penal servitude, shall not, as a consequence of such sentence, be discharged from the service. Such offenders will be sent to a prison to be specially appointed for them."⁴

Officers thereupon cease to belong to the service; soldiers are specially dealt with.

whether under sentence of civil power or of courts martial,

773. The same circular directs that an immediate report of sentences of penal servitude upon soldiers should be made to the adjutant-general, for the information of the general commanding in chief.

and these sentences immediately reported to the adjutant-general.

774. Courts martial have not noticed the *place* of imprisonment in their sentence, since the year 1844. The place of imprisonment under the sentences of any courts

IMPRISONMENT.

(3) Art. War, 20. A provision to this effect was inserted in the mutiny act of 1844. The previous year had presented the painful spectacle of an offender, upon whom the sentence of transportation for embezzlement had been confirmed by the commander-in-

chief in India, being necessarily borne on the muster rolls as an officer, until Her Majesty had declared she had no further occasion for his services.

(4) Circ. Mem. Horse Guards, 21st Feb., 1861.

Imprisonment;
place of; fixed,
by general
commanding in
chief, or
by superior and
commanding
officers,

martial, is appointed by the general commanding in chief or the adjutant-general or by the officer confirming the proceedings, and in default of such appointment by the officer commanding the regiment or corps to which the offender belongs or is attached. The order, as first provided in 1861, must specify *the offence of which he shall have been convicted, and the sentence of the court, in addition to the period of imprisonment which he is to undergo, and the day and hour of the day on which he is to be released, as before required.*⁵

who select it
according to
instructions
from superior
authority.

775. The officers authorized to appoint the place of imprisonment have thus the power in all cases, which they did not previously possess, of selecting the place, whether a civil gaol or a military prison, in which the offender is to be confined. General and other officers are to be guided in the selection of the prison by such instructions as they may, from time to time, receive from superior authority.⁶

Incorrigible
offenders to be
committed to common
gaols.

776. All soldiers, who, in addition to an award of imprisonment, may have been recommended by courts martial for discharge with ignominy, or whose discharges may have been sanctioned on the grounds of continued and incorrigible misconduct, are to be committed, when practicable, to civil prisons.⁷

Provost cells
available for
periods of
imprisonment,
not exceeding
forty-two days.

777. At those stations where garrison or barrack cells, of approved construction, have been erected, and duly certified as fit for the confinement of prisoners, they are available for carrying into effect sentences of imprisonment for forty-two days, being the most extended period, for which imprisonment can be awarded by a regimental court martial.⁸

The system of
barrack cells
and military
prisons

778. In other cases, prisoners are to be committed to the prison of the military district to which they belong. Ten military prisons in the United Kingdom (which complete the system at home) and eight abroad, making a total of eighteen prisons,⁹ capable of accommodating about 1800 prisoners,

(5) Mut. Act, sec. 30.

(6) Circular. War Office, 18th April, 1844.

(7) Circ. Mem. Horse Guards, 16th January, 1847. Rules for Military Prisons. Rule 146. Further enforced by circular, dated 18th June, 1862. See § 778 [1].

(8) Rules and Regulations for Gar-

rison or Barrack Cells. Queen's Reg. pp. 229-239.

(9) Viz.:—ENGLAND: Chatham, Gosport, Weedon, Devonport, Aldershot. SCOTLAND: Greenlaw, near Edinburgh. IRELAND: Dublin, Cork, Limerick, Athlone. ABROAD: Gibraltar, Montreal, Quebec, Halifax N.S., Bermuda, Vido, St. Elmo (Malta), and

are now in operation under authority of the secretary for war, and, together with the system of provost cells, have caused a very great and most beneficial decrease of the number of cases, where it is necessary to have recourse to common gaols, which, as observed by Lord Hill¹ in 1830, is an expedient which all officers concur in considering objectionable, "and which it would be very desirable to reserve, if practicable, for crimes of a disgraceful nature."

prevents the necessity of having recourse to civil gaols.

779. Forms of commitment, according as the prisoner may be sent to a military or other public prison or to garrison or barrack cells, are established by authority, and commanding officers are enjoined on no account to use any other form.²

In the established form of commitment.

780. In calculating the period of imprisonment, the day on which the sentence commences, and that on which the prisoner is to be released, are both to be counted, and it may also be mentioned that where *days* are not specified in this and all other cases, the regulations explain that, unlike the legal usage, unless *calendar* months are expressly specified, lunar months of twenty-eight days each are to be understood.³

Periods of imprisonment, how calculated.

The regulations contemplate "months" of twenty-eight days.

781. Escorts with prisoners committed to military prisons should be sent so as to arrive at the prison before six P.M., and prisoners should not be sent so as to arrive on Sundays, when it can be avoided.⁴

Admission of prisoners to military prisons.

782. Every prisoner is to be released from a military prison at seven A.M. of the day on which his sentence expires, except when that happens on a Sunday, Christmas-day, or Good Friday, in which case he may be released at four P.M. of the previous day, or at such earlier hour (if the corps be at a distance) as will enable the non-commissioned officer sent to take charge of him, to return to his corps or detachment the same evening.⁵

and release therefrom.

783. The mutiny act had for a series of years provided for the removal in military custody of prisoners undergoing imprisonment under sentence of court martial, upon the order,

Removal of prisoners in military custody, and change of place of imprisonment,

Mauritius. A portion of the penitentiary at Kingston, Canada West, has been set apart for the exclusive confinement of military offenders.

(1) Circular, 24th June, 1830. "Prisoners of hardened character are to be committed to the nearest county gaol, when the district military prison does

not afford disposable accommodation." —Queen's Reg. p. 225.

(2) Queen's Reg. p. 226. Prison Rule, 54.

(3) Queen's Reg. p. 226. See note, § 685.

(4) Prison Rule, 147.

(5) Prison Rule, 179.

Removal of
prisoners.

from civil
prisons in the
United
Kingdom,

of either the officer commanding the district, or garrison, or of the confirming authority, but attention having been drawn to a failure in its provisions by the recent case of Lieutenant Allen,⁶ the judge advocate, in conjunction with the war department, introduced an alteration into the mutiny act of 1861 with the intention of providing against the recurrence of a similar state of things.⁷

784. This will serve to show the very great necessity of adhering to the very letter of the statute,⁸ which, as now modified, enacts that in the case of a prisoner undergoing

(6) Lieut. W. H. C. Allen, of the 82nd regiment, was tried by a general court martial at Shahjehanpore, on the 13th February, 1859, for the murder of his native servant, and, having been convicted of manslaughter, was sentenced to four years' imprisonment without hard labour.

General Lord Clyde confirmed the sentence, and ordered him to be imprisoned in the fort at Agra; and, on the 29th November, 1859, gave a written order for his removal in military custody to England, there to undergo the remainder of his sentence. On arrival, he was successively committed to Millbank, the military prison at Weedon, Newgate, and the Queen's Prison.

After having been imprisoned in this last prison for four months, he applied to the Court of Queen's Bench sitting *in banco*, for a writ of *habeas corpus*, upon the ground that he was detained in illegal custody, and that the authorities had acted under the impression that they had power to deal with his case under the sections of the mutiny act which applied to penal servitude.

Lord Chief Justice Cockburn, on the 24th Nov., 1860, pronounced the final decision of the court in favour of the application, observing that "It was not necessary to determine whether the 41st section of the mutiny act gave power to remove the prisoner; for, even if it did, the provisions of the act had not been complied with, and no legal warrant could be produced by virtue of which the keeper of the Queen's Prison could detain Lieutenant Allen in custody. His lordship referred to the 40th section, which gave power to the commanding

officer of a regiment in any part of Her Majesty's dominions to make an order in writing upon the governor of any prison to receive a prisoner, and to the 41st section, which gave power to the commanding officer of the district to make an order in writing directing a prisoner to be removed to some other prison or place; and his lordship observed that there was no order in writing, under either of those sections, under which the keeper of the Queen's Prison could detain Lieutenant Allen. All that appeared was, that Lord Clyde, the commanding officer of the district, had directed an order to be issued to the governor of Agra for Lieutenant Allen's removal to Calcutta, to be sent to this country to undergo the remainder of his sentence; but it did not appear that either the officer commanding the regiment or Lord Clyde had made any order upon the keeper of the Queen's Prison to receive Lieutenant Allen. The deficiency was attempted to be made up by an order under the hand of the adjutant-general representing the commander-in-chief, and stating that Lieutenant Allen had been convicted by a court martial in India. That, however, was not a legal warrant, and, under the circumstances, the court was constrained, though unwillingly, to discharge the prisoner."

Subsequently to his release, Lieut. Allen entered ten actions against the authorities concerned in his illegal detention, and, as already mentioned (§ 746), obtained damages in the two that were tried.

(7) Mr. Headlam, House of Commons, 19th July, 1861.

(8) Mut. Act, sec. 31. (Section 41, Mutiny Act, 1859.)

imprisonment under the sentence of a court martial in any public prison, other than the military prisons, in any part of the United Kingdom, the general commanding in chief, or the adjutant-general, or the officer who confirmed the proceedings of the court, or the officer commanding the district or garrison in which such prisoner may be, may give, as often as occasion may arise, an order in writing directing that the prisoner be discharged, or be delivered over to military custody, whether for the purpose of being removed to some other prison or place *in the United Kingdom*⁹, or of being brought before a court martial either as a witness or for trial;—and in the case of a prisoner undergoing imprisonment or *Penal Servitude* (§ 770) under the sentence of a court martial in any public prison other than a military prison in any part of Her Majesty's dominions *other than the United Kingdom*, the general commanding in chief or the adjutant-general of Her Majesty's forces in the case of any such prisoner, and the commander-in-chief in *India* in the case of any prisoner so confined in any part of Her Majesty's *Indian* dominions, and the general commanding in chief in any presidency in *India* in the case of a prisoner so therein confined, and the officer commanding in chief or the officer who confirmed the proceedings of the court at any foreign station in the case of a prisoner so there confined, may give an order for the removal of the prisoner to some other prison or place *in any part of Her Majesty's dominions*¹⁰ or for his being brought before a court martial as a witness or for trial. The officer¹ who gave the order must also give

Removal of prisoners from civil prisons.

in the colonies

in India;

(9) The words "in the United Kingdom" were inserted in 1861, and restricted the powers previously exercised by the officers empowered to give an order for the removal of prisoners. They cannot now give an order for removal to any place beyond seas, where the prisoner is confined in a civil prison.

This limitation does not apply to the case of military prisons, and, as soldiers who rejoin their corps are very rarely committed to civil prisons (§ 778), it is not attended with any of the practical inconvenience, which would arise if a regiment, ordered for foreign service, were unable to take their prisoners with them on embarkation, unless their sentences of imprisonment were remitted.

sonment were remitted.

(10) The like powers as may be exercised by any of the military authorities mentioned in the section include the powers exercised in the case of a prisoner confined in a public prison abroad, namely, of removal to "*any part of Her Majesty's dominions*," and, consequently, these words afford a legal warrant for the practice of removing prisoners from military prisons for the purpose of recommitment on arrival abroad, where the sentence has not expired on board ship.

(1) It will be observed that the same officer, who gave the order for removal, and not any of the military authorities mentioned in the section, must give the order of committal.

Imprisonment.

The officer giving the order of removal must also give an order for committal.

Removal from military prisons

without reference to place.

The superior officer has the power of authorizing the removal, &c., of prisoners in military prisons.

The commanding officer may order the release of prisoner from provost cells.

Sentences of imprisonment are continuous.

Prisoner sick in hospital; may be recommitted on recovery.

an order in writing directing the governor, provost marshal, gaoler, or keeper of such other prison or place to receive such prisoner into his custody, and specifying the offence of which he has been convicted, and the sentence of the court, and the period of imprisonment which he is to undergo, and the day and the hour on which he is to be released. In the case of a prisoner undergoing imprisonment or penal servitude under the sentence of a court martial in any military prison in any part of Her Majesty's dominions or in the *Ionian Islands*, the secretary of state for war, or any person duly authorized by him in that behalf, has *the like powers*² in regard to the discharge and delivery over of such prisoners to military custody as may be lawfully exercised *by any of*³ the military authorities above mentioned in respect of any prisoners undergoing confinement in any public prison other than a military prison, in any part of Her Majesty's dominions.

785. Whenever the corps, to which a prisoner belongs, is ordered to leave the district, and on any other occasion when it may be deemed expedient to remove a prisoner confined in the military prisons, the general or other officer commanding the district or station has full authority to give directions accordingly.³

786. The commanding officer may order the release of any prisoner from garrison or barrack cells, should the remainder of his punishment be remitted, or upon the march or embarkation of the regiment, or in consequence of sickness or any other cause.⁴

787. The intermediate periods are to be counted as part of the sentence, the mutiny act providing "that the time during which any prisoner under sentence of imprisonment by a court martial shall be detained in military custody shall be reckoned as imprisonment *under the sentence*, for whatever purpose such detention shall take place."⁵

788. It is scarcely necessary to remark, that in the event of sickness requiring the removal of a prisoner to a military hospital, he may, on recovery, (should the remainder of

(2) See note (10) on preceding page.

(3) Letter, Secretary at War, 14th July, 1847. See last note but one (1).

(4) Form of Order to Provost Ser-

jeant.— Rules and Regulations for Garrison and Barrack Cells. Appendix, No. 5.

(5) Mut. Act, sec. 31.

his punishment not be remitted) be returned to imprisonment.⁶

789. As a prisoner's sentence of imprisonment expires with the period reckoned from the date of the commencement of the sentence (§ 686), should he effect his escape from prison, the course to be pursued, on his recapture, is to prefer charges for that offence,⁷ and not to commit him to prison for an equivalent period: he may, however, be legally re-committed to prison under his sentence if he be retaken before the expiration of the period of his imprisonment.

Prisoner making his escape, cannot be re-committed for an equivalent period.

790. The general rule with respect to the remission of imprisonment, as of other punishment, is that the confirming authority has the power at any time of remitting any portion at discretion. The Queen's regulations point out that "In the case of district courts martial, the commanding officer may, if he should see reason, recommend a partial remission of the punishment to the general officer, who approved the sentence. In the case of regimental courts martial, approved by himself, he has the power of using his own discretion."⁸

REMISSION OF IMPRISONMENT. General rule as to remission of imprisonment.

Power in the confirming authority.

The thirty-fourth section of the mutiny act, referred to above, provides for the case of men confined in other than the military prisons, but, it was explained in a circular memorandum,⁹ that this provision does not extend to the buildings set apart as military prisons, which are placed by the act strictly under the superintendence of the secretary at war, and the visitors, appointed by the act and by his authority under it, and that no soldier committed to a military prison can be legally discharged from custody before the expiration of his sentence, without the secretary at war's sanction, or that of one of the general officers to whom he may have deputed his authority; and the commander-in-chief being of opinion that the remission of punishment should, in all cases, depend on the conduct of the soldier while in prison, his grace was pleased to direct that "when commanding officers or others to whom the secretary at war's authority has not been deputed, see fit to recommend the remission of a portion of the imprisonment awarded by

Exception arising from establishment of military prisons administered by the secretary at war.

with reference to soldiers committed to military prisons,

(6) When in hospital, he is considered a prisoner, and forfeits his pay, as for the portion of time during which he may be actually imprisoned.

(7) See before, § 363, 767.

(8) Queen's Reg. p. 225.

(9) Circ. Mem., Horse Guards, 20th May, 1847.

Remission of imprisonment

a regimental or other court martial, the recommendation may be addressed to the visitors of the military prison to which the soldier shall have been committed, for their consideration and approval, previously to his release by competent authority."

does not affect the exercise of mercy by confirming authority before committal.

791. The circular also pointed out that it was "to be clearly understood that this order has reference only to the remission of imprisonment subsequent to committal, and that it was in no manner intended to interfere with or restrict the exercise of mercy by commanding officers or others in remitting or diminishing the amount of punishment awarded to soldiers when confirming the sentence of courts martial."

Visitors may recommend prisoners for remission of a portion of their sentence,

792. It is provided by the rules and regulations for the military prisons that "If it should at any time appear to the visitors, from the representation of the governor and chaplain, or their own observation, that the conduct or demeanour of any prisoner has been particularly marked by a soldierlike submission to the discipline of the prison, and attention to the duties required of him, they are empowered to make a special report of the circumstances to the secretary at war, or to the officer to whom he may have delegated authority to remit sentences,¹ accompanied by such recommendation as to a remission of a portion of the prisoner's sentence by the proper authority as they shall see fit."²

which the superior officer, if deputed by the secretary at war, may order.

FORFEITURE OF SERVICE,

entered in soldier's record.

793. Forfeitures of service by sentence of court martial, or on conviction of desertion, take effect on the confirmation of the sentence, and, (as also deductions of service by imprisonment or otherwise) are inserted periodically in the register of soldiers' services.³

Restoration of service forfeited on conviction of felony or desertion, or by

794. Soldiers who have forfeited⁴ their service, either absolutely or in part, are not left to serve on without the hope of regaining the advantages accruing therefrom, the

(1) The secretary at war, by letter dated the 27th February, 1847, gave full authority to the generals commanding districts and stations in which the military prisons are situated, to remit, on the recommendation of the visitors, any portion of the sentence of a prisoner confined therein, without waiting for his approval, except, at home, in the case of a man imprisoned by sentence of a general court

martial.

(2) Rule 15.—In the order to the governor for the release of any prisoner, in consequence of a remission of his sentence, the officer having authority is required to state briefly the circumstances under which he has deemed it expedient to grant such order.

(3) Explanatory Directions, p. 144.

(4) Art. War, 52.

articles of war humanely and wisely providing that any such soldier, if he shall have subsequently served and performed good, faithful, or gallant services, may, on the same being duly certified by the commander-in-chief, be eligible to be restored to the benefit of the whole or of any part of his service;—and, should the restoration be approved by the Queen, Her Majesty's order for the same will be signified through the secretary for war.

sentence of
court martial,

must be ap-
proved by the
Queen.

795. Applications for the restoration of advantages as to additional pay and pension on discharge, in the case of those soldiers who have established their claim thereto, in the terms of the Queen's regulations, are to be made twice in each year, in a prescribed form, and are to be transmitted with the confidential inspection reports of the regiment to which the men belong.⁵

Soldiers esta-
blishing claims
for restoration
by good conduct.

are recom-
mended twice in
each year.

796. Soldiers convicted of having been drunk when on or for duty, or on the line of march, or convicted of habitual drunkenness, and sentenced in either case to forfeiture of one penny a day or more of their pay, being at or being removed to a station where liquor is issued in kind, or embarked on board of any vessel, where liquor is provided as a part of the ration, are deprived of their liquor, instead of forfeiting one penny a day of their pay, for so long a time as they shall be at such station, or on board such vessel, and their sentence to forfeiture of pay shall continue in force.⁶

FORFEITURE
OF PAY.

Operation of
forfeiture for
drunkenness.

797. "If a soldier be sentenced to forfeiture of pay, or additional pay, for any particular period not specifically included in the period of imprisonment, such award is to be considered as an addition to the penalties of imprisonment, and to commence from the termination of such imprisonment. A soldier already under sentence of forfeiture, if again confined and convicted before the first sentence is expired, is not to be allowed to reckon the period of such confinement towards the completion of the first sentence."⁷

Period of for-
feiture not
continuous:
soldiers in
confinement,
&c., having no
pay to forfeit,
periods of
imprisonment
not allowed
to reckon
towards
fulfilment of
sentence to
forfeiture.

798. With reference to the letter D, with which the court may order a deserter to be marked, the mutiny act prescribes that it shall be two inches below and one inch in rear of the nipple of the left breast, not less than an inch long, and

Marking de-
serters

with letter D
in terms of
the mutiny act,

(5) Queen's Reg. p. 173.
(6) Art. War, 82.

(7) Explanatory Directions, p. 56.

The letter D.

marked upon the skin with some ink or gunpowder, or other preparation, so as to be clearly seen, and not liable to be obliterated.⁸

intended more as a protection to the service than to punish the deserter.

799. The primary design of this provision being not so much to punish the deserter, as to protect the service against his enlisting into some other corps, much importance is attached to this part of the sentence being duly and effectually carried out. By a circular memorandum of the 25th June, 1847, it was directed that the method of marking with needles should be reverted to throughout the service.¹ The punishment of marking with the letter D a deserter committed to a military prison is invariably to be inflicted in the person² by the infirmary warder, or other subordinate officer in the presence of, and instructed by, the medical officer attached to the establishment. Deserters who are not sent to a military prison are to be marked in hospital at the head quarters of their corps, under the superintendence of a medical officer, before being committed to their appointed place of imprisonment. Deserters are to be marked in like manner, when they are sentenced to penal servitude, without previous imprisonment.³

Care taken to render the mark effectual.

Operation by means of needles, performed in hospital, under superintendence of medical officer; when practicable in military prisons.

Marking with the letters B. C.

800. Soldiers sentenced to be discharged with ignominy and marked with the letters "B. C." are so marked by the hospital-serjeant of the regiment or depôts to which the offenders belong, under the direction of a medical officer. The marking is to be effected prior to the offender's committal to a civil prison, and to be carried out after the existing mode of marking with the letter D.⁴

Process of discharging a soldier with ignominy.

801. The regulations prescribe the ceremony which takes place when, in pursuance of the recommendation of a court martial, orders⁵ are given by the superior authority

(8) Mut. Act, sec. 26.

(1) It had been ordered in 1842 that this punishment should be inflicted on the parade, in the presence of the men, under the personal superintendence of a medical officer, the operation being performed with an instrument of prescribed pattern.

(2) A letter from the Deputy Secretary at War to governors and officers in charge of military prisons, 8th October, 1851, pointed out that "the object of marking deserters being

more to prevent their re-enlistment when discharged from the service than for the infliction of a punishment, the same should be effected in the prison surgery, and not in the presence of all the prisoners."

(3) Queen's Reg. p. 228.

(4) Circ. Mem., Horse Guards, 28th August, 1862.

(5) The considerations which are to guide general officers abroad in giving effect to the recommendation of courts martial for the discharge of soldiers

for discharging a soldier with ignominy. The regiment being assembled, and the man about to be discharged brought forward, the several crimes and irregularities of which he has been guilty are recapitulated, and the order for his dismissal from the service is read, together with his discharge, in which is noticed his ignominious and disgraceful conduct. The buttons, facings, lace, medals, and any other distinctions,⁶ are then to be stripped from his clothing; he is marched down the ranks and trumpeted or drummed, as the case may be, out of the barracks or quarters of the corps,⁷ and, in those cases where he is under sentence of imprisonment, committed to a civil gaol (§ 776), to undergo his sentence.

Ceremony of discharging a soldier with ignominy.

802. A notification of his dismissal with disgrace is made to his parish by the secretary for war, which, as also the names of soldiers who have received Her Majesty's special approbation for meritorious conduct in the army, the mutiny act requires the churchwardens in England and Ireland, and the constables or other parish officers in Scotland to affix outside the church or chapel door.⁸

Character notified to parish.

803-809. Soldiers serving abroad, who are ordered to be discharged with ignominy on the recommendation of courts martial, are not finally discharged abroad; but their discharge documents are to be completed, and they are to be sent home as prisoners (not in confinement during the passage), for the purpose of being finally discharged on their arrival in England. In every such case, however, the prisoner is to undergo the process of degradation detailed above, before he is permitted to leave the regiment, and after the termination of any other punishment awarded him.⁹

Soldiers drummed out abroad are sent home as prisoners, but not in close confinement during passage.

with ignominy, are laid down in a circular letter, dated Horse Guards, 1st May, 1838.

(6) Forfeited medals (§ 158) are to be transmitted to the adjutant-general for the purpose of being returned to

the mint."—Queen's Reg. p. 193.

(7) Queen's Reg. p. 187.

(8) Art. War, 23. Mut. Act, sec. 75.

(9) Queen's Reg. p. 187.

CHAPTER XIX.

OF EVIDENCE.

"EVIDENCE;"
how employed
with reference
to the practice
of courts
martial.

Oral or parole,
written or
documentary.

The laws of
evidence
essentially the
same in
courts martial
and in common
law courts.

Subject of
this and the
following
chapters.

810. THE term Evidence, considered in relation to the practice of courts martial, and as employed in the oath taken by members, includes all the means, exclusive of mere argument, or comment, which the law allows as fit and appropriate for the purpose of arriving at the truth, in any matter submitted to the determination of a court martial. These are — I. Witnesses examined *vivâ voce* in court as to facts within their knowledge; and, II. Written evidence.

811. The rules of evidence obtaining in the criminal courts of England are, with some slight modifications, those which guide courts martial. Indeed, the rules of evidence, as being laid down as the means to be used for arriving at the truth, are, or ought to be, in all courts of justice, intrinsically the same. Mr. Sergeant Marshall, when he appeared for Serjeant Grant in the court of Common Pleas, "assumed that a court martial was the creature of the mutiny act," and laid it down as an indisputable principle, the truth of which it would indeed be difficult to combat, "that whenever an act of parliament erects a new judicature, without prescribing any particular rules of evidence to it, the common law will supply its own rules, from which it will not allow such newly erected court to depart."¹ It would be inconsistent with the design of this essay to enlarge upon the law of evidence, or to attempt a scientific enquiry as to the principles upon which it is founded. It may be sufficient and perhaps more useful, quoting largely from the latest editions of Phillips, Starkie, and other

(1) 2 Blackstone's Reports, 87. See § 63.

standard works, and referring to established precedents, to point out certain general maxims and technical rules of evidence (§ 812-872), and then to mention briefly positive and presumptive evidence (§ 873); the means of procuring the attendance of witnesses, &c. (§ 890); the competency of witnesses (§ 910); their examination (§ 940) and cross-examination (§ 971); the impeaching of their credibility (§ 979); admissions by parties and the confession of the party charged (§ 990); and lastly to touch upon the rules of written evidence (§ 1010).

GENERAL MAXIMS OR RULES OF EVIDENCE.

812. First, (§ 813) *That the evidence, on either side, must be confined to the points in issue*; Secondly, (§ 829) *That the point in issue is to be proved by the party who asserts the affirmative*; Thirdly, (§ 831) *That it is sufficient to prove the substance of the issue or charge*; Fourthly, (§ 856) *That hearsay is not evidence*; and Fifthly, (§ 865) *That the best evidence must be produced, which the nature of the case will admit of*.

General rules.
Evidence must
be relevant;
proved
by assessor;
sufficient;

not hearsay;
and best.

813. *First.* — That the evidence on either side must be confined to the points in issue, and that all testimony ought to be rejected which is foreign to the charge, cannot be too strongly insisted on by courts martial. Remote or irrelevant facts, from which no fair and reasonable inference can be drawn as to the truth of the matter before the court, must always, not only waste time and distract attention, but also not unfrequently tend to prejudice and mislead. Deviations from the spirit of this rule have incurred the marked disapprobation of the sovereign.²

Evidence
confined to
points in issue.

(2) G. O., 29th August, 1803. Court martial on Captain Barlow, King's Dragoon Guards. "His Majesty, adverting to the voluminous minutes, noticed that the proceedings appear to have been drawn into that length by the court martial having, contrary to their own declared opinion, allowed matter to be brought before them, which did not form a part of the charge in question, and by their having, in some instances, received evidence which

was not properly admissible."

G. O., 8th November, 1845. Court martial on Lieutenant Hyder, of the 10th Royal Hussars. Her Majesty was pleased to "remark that much irrelevant matter appears to have been gone into, and more particularly that the character of a witness for the prosecution was irregularly and unjustly sought to be impeached by examining witnesses to particular facts supposed to have taken place many years since,

Relevancy of
proof,

814. This rule, so important to be well understood, arises from the very object of receiving evidence, which is to establish the truth, as to the questions of fact involved in the charge. Before applying it, however, it is necessary to consider the view, with which evidence may be offered, in order to ascertain whether the proof of a particular fact, so offered in evidence, may or may not be material, and hence, in the exercise of a sound discretion, to decide on the necessity of admitting or rejecting it. Evidence may be admissible in one point of view, though not in another. Circumstances, which have not an immediate and direct bearing on the very point in issue, may nevertheless afford an indirect and consequential inference to prove or disprove the disputed fact, and, therefore, evidence to prove them ought not to be disallowed by a court, provided the party who urges them shall make their consequence apparent.

or of question.

Proof of other
transactions,
on a charge
of stealing.

815. A question irrelevant and improper on the examination in chief may be rendered necessary by the course of a cross-examination. The prisoner is not debarred from such incidental matters as make his history of the transaction, and his own conduct, consistent and natural. Enquiry into other facts, besides those charged, may often be wholly irrelevant; but on a charge of stealing—for example—though it is not material, in general, to enquire into any other taking of goods besides that specified in the charge, yet for the purpose of ascertaining the identity of the person, it is often important to show that other goods, which had been upon an adjoining part of the premises, were taken in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the prosecutor's house on the night of the robbery; and, in that point of view, it is material. Thus also, on an indictment for the crime of arson, it may be shown that property which had been taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner.

on a charge of
arson;

on a charge of
desertion;

816. On a charge of desertion, it may be admissible to

and unconnected with the matter before the court; whereas, according to established law and practice, evidence to the general character of the witness for veracity was alone admissible; and

furthermore, that witnesses were irregularly examined to contradict the evidence of that witness on matters totally irrelevant to the issue."

enquire into the fact of (*not* the facts attending) a highway robbery, committed by the prisoner on the night he absented himself, and for which he had been tried and convicted by a civil court. The crime of desertion, depending on the *absence* of an *intention to return*, might be evinced, in connection with other circumstances, by the commission of a heinous offence.³ Although such evidence may be with propriety adduced to prove the intention of the accused, yet it must be quite obvious that proof of the commission of the most flagrant offence cannot operate as to the amount or nature of punishment, unless the offender be charged with and placed on his trial for the same.

817. On an indictment for murder, former attempts of the defendant to assassinate the deceased are admissible in evidence, as proofs of the existence of malice; as are all former menaces of the defendant or expressions of vindictive feeling towards the deceased, or in fact, the existence of any motive likely to instigate him to the commission of the offence in question.⁴ On the other hand expressions of good will and acts of kindness on the part of the prisoner towards the deceased are admitted for the defence.⁵

collateral facts are admissible in proof of malice; on a charge of murder;

818. In support of a charge for malicious, disrespectful, or unbecoming language, addressed verbally, or written to, or used of, a commanding officer at a stated time, or in a particular letter; after having proved the words charged, the prosecutor may prove also that the accused spoke or wrote other disrespectful or malicious words on the *same subject*, either before or afterwards, or that he published or disseminated copies of the letter set forth as disrespectful in the charge. This evidence is admissible, not in aggravation of the crime charged, but for the purpose of proving deliberate malice or disrespect, which motives are imputed in the charge. So, on an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that at another time the prisoner intentionally shot at the same person.⁶

and on other charges implying malice.

(3) A conviction of highway robbery in the United Kingdom would, from the sentence awarded, in all probability render inexpedient a subsequent trial for desertion; but, within the experience of the author, the case

supposed actually occurred.

(4) Archbold, Criminal Cases (1862), p. 193.

(5) See hereafter, § 859.

(6) *Rex v. Voke*. Russ. and Ry., 531.

Conduct and sentiments of prisoner on particular occasions not charged,

819. Where intention is put in issue by the nature of the charge, as where a prisoner is charged with treason, or with a design to undermine the influence of the commanding officer, an enquiry may be allowed into the conduct and sentiments of the prisoner on particular occasions, but still with reference to the overt act charged and to the transactions which are proved against him. The intention of one particular act may be best evinced by other contemporaneous actions; but in this necessary relaxation of the maxim under consideration, great caution is needed to prevent injustice to the prisoner by extending the enquiry to matter wholly unconnected with the charge. It would be the height of injustice to allow such an attack upon him as would involve the necessity of his entering unprepared and at once upon the defence of every action of his life.

on a charge of, conspiracy.

820. On a prosecution for offences involving a charge of conspiracy entered into by the prisoner then under trial, general evidence of the existence of the conspiracy charged against him and not relating to the particular conduct of the prisoner may be received in the first instance, though it cannot affect such prisoner, unless it be afterwards brought home to him by showing his connection with the conspiracy.⁷

Acts or declarations of co-mutineers, analogous to

821. On the consideration of a charge of mutiny, or exciting mutiny, it may be important to ascertain how far the acts or declarations of co-mutineers, in furtherance of a concerted scheme, may be received in evidence against a particular prisoner, testimony having been previously offered of the existence of a plot, and of the connection of the accused therewith. Precedents, derived from trials before courts of civil judicature for treason and conspiracies, are directly applicable to trials before courts martial for mutiny and sedition. The following is the statement of the law in the last edition of Mr. Phillips' work on evidence. He observes that in prosecutions involving a charge of conspiracy, it is an established rule, "that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law, as well as in sound reason, the

acts and declarations of co-conspirators;

(7) The Judges, Queen's trial. 1 Phillips, 515.

act of the whole party: it follows, therefore, that any writings, or verbal expressions, being acts in themselves, or serving to explain other acts, and so being part of the *res gestæ*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were used in furtherance of a common design."⁸

Writings or words, being part of the transaction (*res gestæ*), are evidence against co-conspirators.

822. "But where words or writings are not acts in themselves, nor part of the *res gestæ*, but a mere relation or narrative of some part of the transaction, or as to the share which other persons have had as to the execution of a common design, the evidence is not within the principle above mentioned: it altogether depends upon the credit of the narrator, who is not before the court, and therefore it cannot be received."⁹

Statements of conspirators when not part of the transaction, being simply *hearsay*, are not evidence against them.

823. "It is in consequence of the distinction between writings or declarations which are a part of the transaction, and such as are in the nature of subsequent statements, but not part of the *res gestæ*, that the admissibility of writings often depends on the time when they are proved to have been in the possession of co-conspirators, whether it was before or after the prisoner's apprehension. Thus on the trial of Watson, some papers, containing a variety of plans and lists of names, which had been found in the house of a co-conspirator, and which had a reference to the design of the conspiracy, and were in furtherance of the plot, were held to be admissible evidence against the prisoner. All the judges were of opinion that these papers ought to be received in the case, inasmuch as there was strong presumptive evidence that they were in the house of the co-conspirator *before* the prisoner's apprehension, for the room in which the papers were found had been locked up by one of the conspirators. And the judges distinguished the point in this case from a case cited from Hardy's case, where the papers were found, *after* the prisoner's apprehension, in the possession of persons who possibly might not have obtained the papers until afterwards."¹

Writings admissible as in possession of co-conspirators before or after apprehension;

papers found in the house of co-conspirators.

(8) 1 Phillips, 157-8.

(9) 1 Phillips, 160.

(1) 1 Phillips, 161-2. A question also arose, in the same case, as to the

admissibility of a paper found among those before mentioned, which contained written questions and answers of a description calculated to excite

Acts and
declarations of
prisoner when
evidence for
him.

824. As in trials for conspiracies, whatever the prisoner may have done or said, at any meeting alleged to have been held in pursuance of the conspiracy, is admissible in evidence against him on the part of the prosecution; so, on the other hand, any other part of his conduct at the same meetings will be allowed to be proved in his behalf: for the intention and design of the party, at a particular time, are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single insulated act or declaration.²

Evidence as to
character of
prisoner.

825. Courts martial do not literally adhere to the rule in courts of civil judicature, which requires that evidence, as to the character of the accused, should bear analogy, and have reference to the nature of the charge in issue. It has ever been the practice of courts martial, confirmed and enforced by a general order in 1830,³ to admit evidence as to the prisoner's character, *offered by him*, whatever may be its nature, immediately after the production of its witnesses to meet the charge: a prisoner is even permitted to put in proof particular instances wherein his conduct may have been publicly approved by superior officers. The court⁴ was also, by the above order, authorized to call witnesses, to enquire into the prisoner's character, but only *after* a sentence of guilt had been pronounced; this is now required by the regulations in every case where a *soldier* had been found guilty.⁵

826. A prisoner before a court martial is always alive to the benefit of character, and, excepting in particular cases,

mutiny in the army; this paper was withdrawn by the attorney-general on account of some doubt expressed by the court whether it had been clearly proved that it was intended to have been used in furtherance of the common purpose. But the observations of Mr. Justice Abbott (since chief justice) tended to show that the question of its admissibility in evidence, depended not on its having been printed or circulated, but on its reference to the treasonable practices charged in the indictment.

(2) 1 Phillips, 516.

(3) Horse Guards, 24th Feb., 1830.

(4) This order for the general commanding in chief was the first intro-

duction of the existing practice of re-opening the court after a finding of guilt, which was altogether different from the previously established usage of courts martial. It had not previously been customary for courts martial to originate evidence as to general character, and this custom was similar to that still obtaining in point of civil judicature. Courts martial often intimated to a prisoner the expediency of his calling evidence as to character, it being considered optional with him to adopt the suggestion, or to decline acting on it.

(5) Queen's Reg., p. 223: see before, § 633-5.

applying chiefly to officers, is prepared to abide the consequences of not producing evidence to this point. Care is taken, that the evidence as to character, called for by the court, may not influence the finding, but the practice is subject to the inconvenience that, in some cases, it may unavoidably let in much extraneous matter; a prisoner cannot be restricted from cross-examining as to particular facts, and as to the opportunities which the witness may have had of forming the opinion given (§ 635 [6]); nor can he be prevented from meeting the enquiry by the testimony of fresh witnesses; and, it is conceived that a reasonable time could not be refused the prisoner to obtain such evidence, in any case the least plausible. It would not be a sufficient reason for debarring a prisoner from such dilated investigation, that the question of guilt had already been decided, and that the weight of character could only apply to punishment. Punishment, and the nature of punishment too, must be held to be of momentous consequence to the prisoner, but in many cases the question of character may be vastly more important. If the possibility of unfair or prejudiced testimony be admitted, (and this possibility cannot be rejected in a court of justice,) the necessity of affording the prisoner every opportunity of rebutting the testimony, elicited on an enquiry into character, cannot be questioned.

Prisoner may cross-examine witnesses to character,

and produce evidence to refute their testimony.

827. On a court martial, as in a court of civil judicature, a *prosecutor* is not permitted, under any circumstance, to examine as to *general habits*, in order to show that the prisoner has a *general* disposition to commit the same kind of offence as that charged against him.⁶

Prosecutor cannot examine as to general habits, to show that the prisoner has a general disposition to commit offence charged.

828. That character, unconnected with the charge, cannot be admitted to weigh in the balance of evidence, as to the finding of the court, is too obvious to need remark. This may be inferred from the order above quoted, (§ 825) which prohibits an enquiry into character by the court, until the finding, or, as it is commonly termed by courts martial, *the opinion*, be ascertained. But where intention is a principal ingredient in the offence, or where circumstantial proof only is adduced, evidence as to character, *bearing on the charge*, may be highly important. On a trial for treason, Lord

Character not analogous to charge, cannot weigh as evidence.

Character,
when bearing
on the charge;

on a charge of
murder;

on a charge of
theft;

on a charge
implicating
courage.

The *onus pro-
bandi* lies on
the party
asserting the
affirmative;

exceptions.

Kenyon observed: "An affectionate and warm evidence of character, when collected together, should make a strong impression in favour of a prisoner; and when those who give such a character in evidence are entitled to credit, their testimony should have great weight with the jury."⁷ On a charge of murder, where malice is essential, expressions of good will and acts of kindness on the part of the prisoner towards the deceased, are always considered important evidence, as showing what was his general disposition towards the deceased; from which it may be concluded that his intention could not have been what the charge imputes.⁸ On a charge of theft, character for honesty may be entitled to great weight. So also on a charge implicating the courage of a soldier, character for bravery and resolution might be of vast importance; but it would be manifestly absurd and irrelevant, when deliberating on a charge of theft, to allow character for bravery to weigh in the scale of proof; or, when deciding on a charge of cowardice, to be biassed by a character of honesty. General character, unconnected with the charge, though it must be inoperative with the court, except as to determining the nature of punishment in discretionary cases, may most essentially serve the prisoner, by influencing the superior in whom the power to mitigate or remit the sentence is vested.

829. *Secondly*.—That the point in issue is to be proved by the party who asserts the affirmative, is a rule of evidence arising from the difficulty, in many cases the impossibility, of proving a negative.

830. This rule admits of exceptions, difficult to illustrate by reference to military trials; it may, however, be exemplified by referring to an action under the old game laws: it was held, that though the plaintiff must aver, in order to bring the defendant within the act, that the defendant was not duly qualified, yet that it was sufficient to prove the act of sporting: but that it would be for the defendant, if he could, to prove himself qualified, for all the qualifications were peculiarly within knowledge of the party himself; but the prosecutor would probably have no means of proving a disqualification: he could not prove a negative.⁹ Where

(7) King v. Thelwell, O. B., 1794.

(8) 1 Phillips, 507.

(9) 1 Phillips, 553.

one party charges another with a culpable omission or breach of duty; in such case, the person who makes the charge is bound to prove it, though it may involve a negative; for it is one of the first principles of justice not to presume that a person has acted illegally till the contrary is proved.¹ It is unnecessary to dilate on this rule: from what has been observed, it may be seen that the burden of proof attaches to him who has to support his case by the proof of a fact, in every instance where it can by possibility be supposed to be within his knowledge.

A party charging neglect of duty must prove it.

831. *Thirdly*.—That it is sufficient to prove the substance of the issue, is a rule in law on which courts martial are continually required to act. A due consideration of the statutory provisions hereafter quoted,² and of the following examples, will lead to a correct conclusion, in cases where this principle is involved. Resort has been had to precedents from courts of civil judicature; because it may be supposed that the soundness of the law, involved in the custom or decision, is not so liable to be questioned, as though the maxim were exemplified solely by reference to decisions of courts martial.

Substance of the charge only need be proved.

832. The following clause of Lord Campbell's act is given at length, as it directly affects the proceedings of general courts martial for trial of civil offences, and the principle is applicable in other cases: "Whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof: For remedy thereof be it enacted, That if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or mis-

Offenders indicted for felony may be found guilty of an attempt to commit the same, and shall be liable to the same consequences as if charged with and convicted of the attempt only.

(1) 1 Phillips, 553.

(2) § 832, 845-8.

No person so tried to be afterwards prosecuted for the same.

Examples, in actions of slander or disrespect, part of words charged may establish the charge;

on a charge of rape, the assault may be found;

on a charge of burglary, or

of robbery, stealing may be found;

on a charge of murder, manslaughter may be found;

demeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.”³

833. In actions for slander, the courts used to hold that the plaintiff was bound to prove the words precisely as laid: but it is now settled, that it will be sufficient if the plaintiff prove some material part of the words alleged on the record. If the declaration contain several actionable words, the plaintiff will be entitled to a verdict on proving some of them.⁴ This rule may obviously be applicable where disrespectful or insubordinate language is the subject of a military charge.

834. If an indictment charge the prisoner with an assault on *A. B.*, with an intent to abuse and carnally know her, this allegation is divisible; and if the jury find the assault with an intent to abuse, and negative the intent to carnally know, the prisoner may still have judgment given against him.⁵ On an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night, the prisoner may be found guilty of an attempt (§ 1173-4); or on a charge of robbery, where the property was not taken from the person by violence, or by putting in fear, the prisoner may be found guilty of stealing from the person (§ 1169). So, on the trial of an indictment for robbery, the prisoner may be convicted of an assault with intent to rob.⁶ Where there are two prisoners, one may be found guilty of the burglary, and the other of the larceny or other felony merely.⁷

835. On the trial of a prisoner for murder, he may be found guilty of manslaughter only; for the principal matter is the killing, and the malice is only a circumstance in aggravation.⁸

(3) 14 & 15 Vict. c. 100, s. 9.

(4) 1 Phillips, 560.

(5) *Rex v. Dawson*, 3 Stark., 62. As to common assaults and assaults with intent to commit felony, see § 1139.

(6) 24 & 25 Vict., c. 96, s. 41.

(7) *Russ. & Ry.*, 520.

(8) 1 Phillips, 563. See the charges and finding arising out of the duel

at Corfu, in which Lieutenant Scobell, half-pay unattached, was killed; the surviving principal and the seconds were charged with *wilful murder*, of which they were acquitted, but found guilty of *manslaughter*, and sentenced to be imprisoned: the principal and his second for four years, the second for the deceased for six months. G. O., No. 536.

836. If the indictment charges that *A* gave the mortal blow, and that *B* and *C* were present, aiding and abetting, &c., and on the evidence it appears that *B* struck, and that *A* and *C* were present, aiding, &c., this is not a material variance; for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others as if they all three had held the weapon and had all together struck the deceased. The identity of the person supposed to have given the stroke, says Mr. Justice Foster, is but a circumstance, and in this case a very immaterial one. The stroke of one is, in consideration of law and in sound reason too, the stroke of all. They are all principals in law, and principals in deed.

where several aid and abet, the act of one is the act of all.

837. On courts martial, a prisoner charged with desertion may be found guilty of *absenting himself without leave*; for absence is the principal matter in issue, the motive and design being concomitants.⁹

On a charge of desertion, absence without leave may be found;

838. On a charge of offering violence to a superior officer in the execution of his office, by discharging a loaded musket at him, the prisoner may be convicted of offering violence, and a proportionate punishment may be awarded for such conduct, although the evidence fail in establishing that the rank or authority of the superior officer was known to the offender, or although the capital offence under the mutiny act may not have been committed in consequence of the superior officer not having been in the execution of his office at the time. The principal matter is the *offered violence*, the rank and office of the person fired at are circumstances in aggravation.

on a charge of violence to superior, violence only may be found;

839. On the trial of an officer charged with the conduct, on which is grounded the imputation of behaving in a scandalous manner, unbecoming the character of an officer and a gentleman, the court may absolve the prisoner of the degree of guilt charged, and negative the imputation, either wholly or in part; but if the court find all or some of the facts proved, and if they amount to a disorder or neglect to the prejudice of good order and military discipline, the court may at their discretion award cashiering or other punishment proportioned to the military offence, and *not*

on a charge of scandalous conduct, imputation may be thrown out; — if facts be found, punishment may follow;

which the court then awards at its discretion;

(9) See a provision to this effect in 47th article of war (§ 177 [5]).

contrary opinion
remarked on.

Case at the Cape.

Charge.

Opinion of court ;

necessarily cashiering, which is prescribed positively as the penalty under the eighty-third article of war ;¹ provided,² in every case where such minor degree of guilt is found by the court, that the breach of the article of war which peremptorily declares the penalty of scandalous conduct, be not expressly and exclusively laid in the charge. Mr. Samuel, in his elaborate but, in some cases, unmilitary work has failed to remark this distinction when adducing the case at the Cape, instanced by McArthur ; and also that of Captain Gibbs, at Futtighur, in 1814.³ The case at the Cape is thus given by McArthur : At a general court martial, held at the Cape of Good Hope, in May 1801, an officer was tried, charged with " scandalous, infamous conduct, unbecoming the character of an officer and a gentleman, in having sent a charge of six hundred pounds, or thereabouts, to Sir George Younge, for a horse which the said officer had declared to be a present from him to Sir George, when governor of the colony of the Cape of Good Hope ;" concerning which charge the court martial made a distinction ; they acquitted the officer of scandalous, infamous behaviour, but considered his conduct,

(1) It is not an uncommon, though a most mistaken, impression that—in cases where an officer is either brought to trial on the charge and found guilty of "*conduct unbecoming the character of an officer and a gentleman*;" or else charged with "*SCANDALOUS conduct unbecoming the character of an officer and a gentleman*," but acquitted of so much of the charge as designates his unbecoming conduct as *scandalous*,—the court is bound, although the offence as found *does not* fall under the 83rd article, nevertheless, to award cashiering.

There can be no question but that courts may, and very frequently do, award this, the extreme punishment, under the 108th article, when they are of opinion that cashiering is called for by the nature and degree of the particular offence; but it altogether depends on them either to sentence the offender to be cashiered or to suffer any of the *other* and less severe punishments, ranging from dismissal to reprimand, which they may award at their discretion.

The subjoined extract from a decision of King George the Fourth, may

serve to put this point in its proper light. A general court martial having found an officer guilty of "conduct unbecoming the character of an officer and a gentleman," sentenced him "to be cashiered." They then recommended him in the most feeling terms to the gracious consideration of His Majesty, prefacing their appeal by a statement "that they had awarded the specific punishment which the articles of war prescribe."

"The King has been pleased to approve and confirm the *finding and sentence* of the court: but in consideration of the long services, &c. . . . and the strong recommendation of the court in" the prisoner's "favour, His Majesty has been graciously pleased to remit the sentence; which appeared, moreover, to have been adjudged by the court under an *erroneous impression*, that it was *bound by law* to pass it."—G. O., Horse Guards, 6th Nov., 1821.

(2) This limitation has been retained, although, it may be observed, it has reference to an obsolete form of charge.

(3) Samuel, 648–651.

nevertheless, as unbecoming the character of an officer and a gentleman, for which they adjudged him to be suspended from rank and pay for the space of six calendar months. The proceedings having been laid before His Majesty, the judge advocate general signified to Lieutenant-General Dundas, the commander-in-chief of His Majesty's forces at the Cape, that His Majesty, laying out of the case any question touching either the right or delicacy of the officer's claim to a compensation for the horse, concerning which the difference had arisen, points not within the cognizance of a court martial, considered the adjudication as irregular, inasmuch as the court had acquitted him of the only imputation which could bring the business as a charge before them, namely, of any scandalous or infamous behaviour in the transaction: His Majesty could not, therefore, approve the sentence; at the same time it was signified, that His Majesty was graciously disposed to attribute the error to the nice feelings of the officers who composed the court martial, which had urged them to mark their dislike of a conduct which appeared to them not decorous.⁴

remarks of His Majesty.

840. The other case referred to by Mr. Samuel is that of Captain J. Gibbs, of the 16th Native Infantry: He was arraigned in the year 1814, at Futtighur, for scandalous, infamous conduct, in having endeavoured, at Rewarrie, on or about the 26th October, 1813, to prevail on the wife of Major E. P. Wilson to quit her husband's protection, and fly to his, at a time when it was known that Major Wilson was very dangerously ill. The court acquitted the prisoner of another charge, and on this charge found him guilty of having endeavoured at Rewarrie, (at the time specified,) to prevail on the wife of Major E. P. Wilson to quit his protection, under the circumstances charged: but acquitted him of scandalous and infamous conduct, unbecoming an officer and a gentleman. The Marquis of Hastings, then governor-general and commander-in-chief in India, in remarking on the circumstances of the sentence, observed in his general order to the Indian army: "That the court, in declaring the immoral act, proved against Captain Gibbs, did not come within the description of scandalous, infamous,

Case of Captain Gibbs;

second charge;

opinion of court;

remarks of the commander-in-chief.

and unbecoming the character of an officer and a gentleman, divested itself of all power (in the opinion of the commander-in-chief) to award punishment, because the act cannot stand within military cognizance, but inasmuch as it may be considered to come under the above specific definition; the commander-in-chief must, therefore, regard the court as having returned a verdict of acquittal generally; in this view of the case, his lordship directs that Captain Gibbs shall return to his duty."⁵

Inference from the remarks of His Majesty and the Marquis of Hastings:

841. Mr. Samuel might have noticed that the declaration of His Majesty's sentiments on the trial at the Cape, as expressed by the judge advocate general, points out most clearly that the court acquitted the prisoner "of the *only imputation* which *could bring* the business as a charge before them." An officer's sending an improper charge for a horse, taken abstractedly, could in nowise affect military discipline, and excepting as it might implicate the individual character of an officer, in a degree amounting to "scandalous conduct," no offence under the articles of war could be charged; since there is not any provision in the articles for the cognizance of unofficerlike and ungentlemanlike conduct, (divested of a tendency to affect good order and military discipline,) in any degree less than that involving scandal. So also, the order as to Captain Gibbs very clearly specifies, that the court divested itself of all power to award punishment, *because the act* (as found by them) *could not stand* within military cognizance. If then the court had been of opinion that the act *could* have *stood* within military cognizance, when separated from the imputations built upon it by the charge, the court would *not* have divested itself of all power to award punishment; and, therefore, had the charge been for conduct directly to the prejudice of military discipline, Captain Gibbs might have been lawfully punished on proof of the facts, though stripped of the special imputation charged. In support of this opinion, many cases might be quoted, but the following is selected, because the sentence was confirmed by the sovereign; and in it the accused is expressly acquitted of scandalous conduct, unbecoming the character of an officer and a gentleman, with which he had

unmilitary conduct may be visited by punishment,

though charged as, but not amounting to, scandalous, infamous conduct.

(5) Samuel, 651.

been pointedly and exclusively (so far as the imputation built on the facts extends) charged; and yet, being found guilty of committing certain acts, (set forth as the grounds of imputation charged,) evidently tending to the prejudice of good order and military discipline, the prisoner is punished accordingly.

842. At a general court martial held at Lisbon, on the 19th June, 1810, and continued by adjournments to the 21st of the same month, Lieutenant Thomas Dunkin, of the 4th Dragoons, was arraigned for "*scandalous and infamous conduct, unbecoming the character of an officer and a gentleman, while in command of a detachment of the 4th Dragoons, in the Anacreon transport, on the passage from Portsmouth to Lisbon, by making use of highly improper language to, and striking, Hospital-mate Daniel Maguin, an officer under his command, on or about the 7th March, 1810.*" "The court, having maturely and deliberately weighed and considered the evidence adduced in support of the prosecution against the prisoner, Lieutenant Thomas Dunkin, of the 4th Dragoons, together with what he alleged in his defence, and the evidence thereon, was of opinion that he was guilty of the first part of the first charge preferred against him, in as far as making use of highly improper language to, and striking, Hospital-mate Maguin, an officer under his command, on or about the 7th of March, 1810, being in breach of the articles of war, and by virtue thereof sentenced him, the prisoner, Lieutenant Thomas Dunkin, of the 4th Dragoons, to be suspended from rank and pay for the space of six calendar months; but the court, in consideration of the grossly insulting language made use of by Hospital-mate Maguin to the prisoner, *acquitted him of scandalous, infamous conduct, unbecoming the character of an officer and a gentleman.*" The king was "pleased to confirm the opinion and sentence of the court; but, in consideration of all the circumstances of the prisoner's conduct, as they appear on the face of the proceedings, His Majesty was pleased to command that it should be intimated to Lieutenant Dunkin, that His Majesty had no further occasion for his service."⁶

843. A soldier charged with disgraceful conduct may, in like

(6) G. O., No. 186. On this subject, see also § 409-11.

conduct imputation thrown out, facts found.

manner, be acquitted of the imputation; and if found guilty of the facts charged, such being to the prejudice of good order and military discipline, may be punished according to the nature and degree of the offence.

Where habitual drunkenness is not proved, the last act may be punished.

844. So also on a charge for habitual drunkenness, as expressly provided in the articles of war, (§ 224) the last act may be punished although the proof of habit may have failed.

VARIANCES.

Lord Campbell's Act lays down

845. With respect to variances, and as connected with the maxim now under consideration, it may be useful again to refer to Lord Campbell's Criminal Justice Improvement Act, (14 & 15 Vict. c. 100). Many important provisions directly apply to the proceedings of courts martial, when employed to dispense the criminal law, although others, in accordance with the custom of the service, can only be brought to bear by the intervention of the superior authority.

the principle of relaxing the technical strictness of former practice.

846. It premises that "offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case:" that "such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence:" and that "a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the *person on trial cannot have been prejudiced in his defence.*"

The court may amend certain variances

847. It enacts (*sec. 1*) that "whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged

to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred."

14 & 15 Vict.
c. 100.

not material to the merits of the case, and by which the defendant cannot be prejudiced in his defence, and may either proceed with or postpone the trial.

848. The twelfth section provides that "If upon the trial of any person for misdemeanor, it shall appear that the facts given in evidence amount to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor," and thus puts an end to a legal subtilty, which led to a failure of justice in many cases, as for example, where a man was tried for an assault on a woman, and it turned out that he had committed a rape, it was held that he was to be acquitted, because the misdemeanor had merged in the felony.

The doctrine of merger put an end to.

849. It depends on the maxim, "*It is sufficient to prove the substance of the issue,*" that it is not held generally necessary to prove the time precisely as laid, except in cases where the particular day or hour may form an ingredient of the offence itself.⁷ This is the constant course of proceeding

Variance in time.

(7) The 7 Geo. 3, c. 64, s. 20, felony or misdemeanor, shall be stayed declares that no judgment or any time at which the offence was com-

in criminal prosecutions before courts of ordinary jurisdiction, from the highest offence to the lowest:—In high treason, evidence may be given of an overt act, either before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form;⁸—nor is greater strictness required in the proof of charges before a court martial.

Adverted to in finding.

850. On the trial of Lieutenant-colonel Alen, the court in their sentence made the following remark, which, as part of the proceedings, was approved by His Majesty: "The court have not taken into consideration the circumstance of the order of the 30th January," (the order, with the infraction of which the lieutenant-colonel was charged), "having been inserted in the *third charge*, instead of the 31st of that month, the mistake appearing to have been merely a clerical one."⁹

Specific finding:

851. In the case of a soldier, who was tried for having deserted on the 19th October, 1833, when in fact he had deserted on the 19th October of the preceding year, but was still illegally absent on the date mentioned in the charge, the court was recommended by the then judge advocate general¹ to come to a specific finding, stating the facts which appeared in evidence as above detailed, and to find the prisoner guilty of the charge, with the exception of so much of it as imported that he deserted on or about the particular date mentioned.

necessary where date or place has been incorrectly stated.

852. It would appear that this specific finding is in strictness essential to the execution of the sentence, and should in no case be omitted when a date has been inaccurately stated.²

mitted, in any case where time is not of the essence of the offence; nor for stating the time *imperfectly*; nor for stating the offence to have been committed on a day *subsequent* to the finding of the indictment or exhibiting the information; or on an *impossible* day; or on a day that never happened.

(8) 1 Phillips, 600.

(9) G.O., No. 425. A breach of *this order* was the subject of the charge.

(1) Mr. Judge Advocate General Robert Grant. — Letter, dated 9th January, 1834.

(2) The judge advocate general remarked upon the case of a soldier of the Scots Fusilier Guards, who was proved (*February*, 1833,) to have committed the offence laid to his charge, but not upon the day specified: "It was perfectly competent to the court to find the prisoner guilty under the charge so framed, although the offence was proved to have occurred on a different day, but, in such case, it was in strictness the duty of the court to specify in their finding on what day the offence took place." As the court in this instance confined itself to

853. An alteration first appearing in the mutiny act of 1834, which has been already adverted to (§ 10), considerably affects the practice of courts martial, as to evidence of place. The jurisdiction of courts martial is extended without limitation as to place, and a mistake as to place, unless the place be material, will not affect the proceedings; the acts of the prisoner, wherever committed, being liable to be given in evidence.

Variance in place, previous custom relative to, affected by existing provision of mutiny act.

854. Where the offence has been incorrectly charged as to place, the court may, as in the case of time, correct this variance by a specific finding. In a recent case the prisoner was charged with deserting from Aldershot, and the court found him guilty of the charge, "except that he deserted from Winchester and not from Aldershot."

Variance as to place corrected by verdict.

855. The same principle applies to allegations of number and quantity, where the proof *pro tanto* supports the claim or charge; as, for example, a prisoner, charged with stealing ten shillings, may be convicted of stealing five.³

856. *Fourthly*.—That hearsay is not evidence, is a rule arising from the admitted principle of English law, that every fact against a prisoner should be proved on oath, and in the presence of the accused, that he may have an opportunity of cross-questioning the witness as to his means of knowledge, and concerning all the particulars of his statement.

Hearsay not evidence;

857. Hearsay, in its legal sense, is used with reference both to that which is written and that which is spoken, being applied to that kind of evidence which does not derive its effect solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information.⁴

"Hearsay," meaning of, as used.

This rule excludes narratives at second hand,

858. But when a witness in the course of stating what has come under the cognizance of his own senses, relative to a matter in dispute, states the language of others which he has heard, or produces papers, which he identifies as being written by certain persons, his evidence may *sometimes* be the very matter in dispute, or something from which

but does not exclude evidence of words or writings, considered as transactions or grounds of inference;

stating the offence had *not* occurred on the day mentioned, the judge advocate general recommended the sentence should not be confirmed.
(3) Starkie, 627.
(4) 1 Phillips, 143.

and not considered as proving their subject matter.

Hearsay is excluded, in cases where no other account can possibly be obtained.

Exceptions,

dying declarations of persons conscious of being in a dying state,

received against a prisoner charged with their death,

and equally when favourable to him.

a pertinent inference, relative to the matter in dispute, may be drawn. In such cases, the words or writings are received in evidence—not in proof of their own truth, but—as being, in fact, transactions, concerning which enquiry may be instituted, whether they have taken place or not. On the other hand, the general rule excludes any verbal or written narrative of facts received from some other person, even if that person were a witness giving his evidence on oath, and which therefore the witness could only deliver to the court at second hand,⁵ even though such statement “purports to be the narrative of an eye-witness of a transaction, and that witness the only one, and he since dead.”⁶

859. Apart from the reception of documentary evidence, and of confessions by prisoners, which will be considered hereafter, there are several deviations from this rule, the most essential of which is in the admission of the dying declaration of a person, (though not made in the presence of the accused, nor subject to cross-examination,) who, having received a mortal injury, relates the cause of his death or other material circumstance, but there must be actual danger of death, and a full apprehension, at the time, of such danger, in order to render such declarations admissible after the death of the party.⁷

860. The mind, in that awful state, is presumed to be under as great a religious obligation to disclose the truth as is created by the administration of an oath: but it is held that such declarations are only admissible “where the death of the person, who made the declaration, is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration.”⁸ The declarations of the deceased in favour of a party charged with his death are admissible equally as where they operate against him.¹

(5) 1 Phillips, 164-8.

(6) 1 Phillips, 167.

(7) By Lord Denman, C.J., 1 Phillips, 244.

(8) 1 Phillips, 241. As the declarations of a dying man are admitted on a supposition that, in his awful situation on the confines of a future world, he had no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and

without malice, it necessarily follows, that the party against whom they are produced in evidence may enter into the particulars of his state of mind, and of his behaviour in his last moment; or may be allowed to show, that the deceased was not of such a character as was likely to be impressed by a religious sense of his approaching dissolution.

(1) 1 Phillips, 242.

861. Words and writings are admitted in evidence when they are connected with, or serve to explain, some act, the nature and object, or the motives of which form part of the subject of enquiry. When actions are attributable to, or result from, deliberation, actions are to be explained by the existing state of the mind.² A prisoner's conversation connected, though by implication or collaterally only, with the subject of enquiry, may be received as indicative of the bias or propensity of his mind. Expressions sometimes afford the only just criterion or index by which to judge of intention and design; and intention and design, forming the very gist or essence of some crimes, the importance of original evidence of words or writings, or of *hearsay* in its larger and more ordinary signification, and the necessity of admitting it in certain cases, must be evident.

Hearsay admissible, not as medium of proof of a distinct fact but as being part of a transaction, or the *res gestæ*.

Conversation of prisoner connected with subject of enquiry.

862. The declaration of a person robbed, or of a woman ravished, as to the fact, made immediately afterwards are evidence to *confirm* them, though the *particulars* of such statements cannot be enquired into.³

Complaint in case of rape, or robbery.

863. What a witness has been heard to say or has written at another time may be given in evidence, under certain circumstances, which will be adverted to with reference to the discrediting of witnesses.⁴

Previous statements by witnesses.

864. What a third person has said, or written, is admissible in many cases, as amounting to an act done by him, or as showing his knowledge, or as evidence of his conduct. If, for instance, it is material to enquire whether a certain person gave a particular order on a certain subject, what he has said or written may be evidence of the order; or, where it is material to enquire whether a certain fact, be it true or false, has come to the knowledge of a third person, what he has said or written may as clearly show his knowledge, as what he has done. So, where it is relevant and material to enquire into the conduct of rioters, or mutineers, or generally of confederates, what has been said or written by any of the party, in furtherance of a common design, must manifestly be admissible as evidence of design and intention, provided that there be sufficient evidence of concert and connection.⁵

Conversation or writing of third person.

Writings or words of confederates receivable in like manner as acts may be.

(2) 1 Phillips, 152.

(3) 1 Phillips, 151.

(4) See hereafter, § 981-3.

(5) 1 Phillips, 157-9. See before, § 821-4.

Best attainable evidence must be adduced.

Where not to be had, secondary is admitted;

but such secondary evidence must be legal evidence.

Production of secondary evidence when better can be had, raises a suspicion of fraud against the party producing it.

Distinction between best possible evidence and strongest possible assurance.

Number of

865. *Fifthly*.—The best evidence the nature of the case will admit of, must be produced, if it be possible to be had. Although in cases where the best possible evidence cannot, by any exertion, be obtained, the law may relax its demand, yet it must be remembered that it cannot forego legal proof. The best *legal* evidence not being attainable, then, and then only, is the next best *legal* evidence admitted. The law does not exclude any *evidence*, which is the *best* that can be produced; but unauthenticated copies and hearsay, (with the exceptions elsewhere mentioned,) are under no circumstances to be admitted.

866. The meaning of this rule is, not that the fullest possible evidence of the matter in question is absolutely and at all times required, but that no evidence shall be admitted, which leaves grounds for the supposition that other and better evidence remains behind in the party's possession or power: for the very production of such secondary evidence tends to raise a presumption of some secret or sinister motive for not producing the best and most satisfactory evidence, and leads to the inference that the evidence withheld would have detected some concealed falsehood.

867. The law excludes secondary evidence for the reasons above noticed, but it does not require the strongest possible assurance; in other words, it does not require the fullest proof the case will admit of, nor a repetition of evidence beyond that which is sufficient to establish the fact. For instance, it is not necessary, in order to prove handwriting, to call the writer himself; nor if a whole regiment should be present at some overt act of mutiny or insubordination, as the striking a commanding officer in front of his regiment, will the law require the production of the whole of the persons present; for if one only were produced, and if, from the situation he was in at the moment of the occurrence, he had as favourable an opportunity of observing what took place as any person present, the evidence afforded by such one witness would be complete, and not inferior in kind to any that could be produced. In such case, therefore, the best possible evidence (best in nature) would have been produced, though not the strongest possible assurance.

868. Sufficient evidence is that which the law requires;

not an accumulation of identical testimony; hence it is, that the law of England admits, as sufficient, the testimony of one *credible* witness;¹ except in trials for perjury, where one alone is not sufficient, without some independent corroborative evidence, because there is in that case only one oath against another,² and in cases of felonious advised and open speaking against the Queen,³ and certain cases of high treason and misprision of treason.⁴ In the case of Atwood and Robins, at the summer assizes at Bridgewater, 1787, the judges of England were unanimously of opinion, and it has since been held as a rule, (modified in practice by certain cautions⁵) that an accomplice *alone* is a competent witness; and that if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony *alone* is strictly legal.⁶

witnesses
necessary for
proof of fact.

Single witness
sufficient when
more are not
enjoined:

but it is the
prudent prac-
tice to require
an accomplice
to be corrobor-
ated as to
some material
fact.

869. In like manner, courts martial are accustomed to receive as sufficient, the evidence of one credible witness to a fact not admitting further proof: nor is there any exception to this practice when such single witness is the prosecutor. The prosecutor before courts martial, as is also the case before courts of ordinary criminal judicature, being a *competent* witness, his *credibility* only is liable to be impeached, and must be judged from attendant circumstances. In cases therefore where the privacy of the offence has excluded the possibility of further proof, and where no facts have been proved to exist, tending to place in doubt the credibility of the prosecutor, courts martial have admitted, as sufficient for conviction, the testimony of the prosecutor alone. At a general court martial held at Kingston, Upper Canada, on the 25th and 26th May, 1814, Paymaster Robert Francis, of the 103rd regiment, was arraigned, found guilty, and sentenced *to be discharged*, upon the undermentioned charge, which admitted the evidence of the prosecutor alone, notwithstanding the prisoner pleaded not guilty to the charge,

Evidence of
prosecutor
sufficient in
certain cases:

case of
Paymaster
Francis:

(1) The general rule of the law of Scotland is to require two witnesses for the proof of a fact; and also the Roman law, the maxim running *Unius responsio non omnino audiat*. But courts martial, in resorting to courts of civil judicature for precedents, are

restricted to the usages of the common law courts of England.

(2) *R. v. Muscot*, 10 Mod. 193.

(3) 11 & 12 Vict. c. 12, s. 4.

(4) 7 Will. 3, c. 3, ss. 2, 4.

(5) See hereafter, § 917.

(6) 1 Phillips, 93-103.

charge.

and strenuously denied the facts set forth in it: "Scandalous and infamous conduct, unbecoming the character of an officer and a gentleman, in taking an opportunity when, from the *absence of a third person*, he appeared to consider himself safe from legal prosecution, to use language highly disrespectful and reproachful to Colonel Scott, his commanding officer, and to throw out disgraceful and infamous insinuations to the prejudice of his character, such conduct being also highly subversive of good order and military discipline, taking place at Kingston, Upper Canada, on the morning of the 19th May, 1814."⁷

Evidence of
prosecutor
sufficient in
certain cases.

Case of Lieut.
Cameron:

charge:

870. A case occurred, about the time of Paymaster Francis' trial, which produced some remarks by the Prince Regent, and must be entirely conclusive as to the legal sufficiency, on courts martial, of one credible witness (though he be the prosecutor) to produce conviction, except in cases *specially* requiring two; the case was as follows: Lieutenant John Cameron, of the 4th Garrison Battalion, was arraigned at Bermuda, in June, 1814, upon charges preferred against him by Captain Hart, of the same corps; "1st. For conduct highly insubordinate and totally subversive of good order and military discipline, on the evening of the 20th May last, in a house rented for officers' barracks, by laying one hand upon the hilt of his sword, and striking Captain Hart a blow with the other; and afterwards, when ordered in arrest, for making a violent blow at the said Captain Hart, in direct breach of the articles of war. 2nd. For leaving the above barracks on the same evening, after being in his room in arrest by order of Captain Hart, and for having, on his return, used insulting and contemptuous language to, and provoking gestures at, the said Captain Hart, in breach of the articles of war, and subversive of good order and military discipline." Upon which charges the court came to the following decision: "With respect to the first charge, that from want of corroborating circumstances the charge is not proved, and, therefore, doth acquit the prisoner." Upon the second: "That walking in the garden belonging to the barracks was not breaking his arrest, and with respect to the latter part of the charge, the court, for the reasons

finding:

*assigned in the first charge,*¹ doth acquit the prisoner." The court was re-assembled by the major-general commanding, to revise their opinion, but adhered to that first given. The proceedings, being submitted to the Prince Regent, were confirmed in the following terms: "Under all the circumstances of the case, the Prince Regent has been pleased, in the name and on the behalf of His Majesty, to confirm the sentence of the court: but as the court must be presumed to have founded their sentence of acquittal upon the belief that Captain Hart's evidence was given under the impression of irritation, and an exaggerated description of what had occurred, there being *no doubt of the legal sufficiency of one witness to justify conviction, if the evidence of such witness be entitled to full credit*; and viewing all the circumstances connected with the conduct of the prisoner, Lieutenant Cameron, the Prince Regent has been pleased to consider him an improper person to remain in the 4th Garrison Battalion, and to command that he shall forthwith be placed upon half-pay."²

remarks of the
Prince Regent.

871. It has been well remarked by Mr. Phillips, on the subject of a single witness, that in deciding upon the effect of evidence, the question is, not by how many witnesses a fact may have been proved, but whether it has been proved satisfactorily, and so as to convince the understanding. The number of witnesses is not more conclusive on matters of proof, than a number of arguments on a subject of reasoning. If the law were in every case peremptorily to require two witnesses, this would by no means ensure the discovery of truth; but it would inevitably obstruct its disclosure, wherever the facts were known only to a single witness; and thus secret crimes might escape with impunity. Abstractedly speaking, there cannot be any reason for suspecting the evidence of a witness, because he stands alone. The evidence of a single witness may be so clear, so full, so impartial, so free from all suspicion and bias, as to produce in every mind, even in the most scrupulous, the strongest and deepest conviction. On the other hand, witness may crowd after witness, all making the same assertions, yet none be worthy of credit. In short, it is the character of witnesses, and the

Evidence of
single witness.

(1) Any inaccuracy perceivable in this paragraph is not attributable to the transcriber.
(2) G. O., No. 346.

character of their evidence, that ought to prevail; not their number.

Exceptions;

sufficient to prove that the accused acted in the character set forth;

or that the authority originating an order acted in the capacity;

or, where doubt as to attestation, that soldier had served six months.

872. To the rule which requires that *the best evidence shall be produced*, there are exceptions which will be noticed in speaking of written evidence. Also it is sufficient to prove that the accused acted in the character alleged in the charge, without bringing direct evidence of his appointment or engagement. Thus, on a charge of neglect of any special duties attaching to a particular post or employment, it would be sufficient to show that the accused had acted in the character set forth, without putting in proof the commission or order under which he acted; this has been ruled on an information in a common law court, against a military officer, for making false returns.³ So also on the trial of an officer or soldier for disobedience of orders given by a particular person, specially authorized by his office, it is sufficient to show that the officer giving the order had previously, in the knowledge of the accused, acted in the capacity alleged. On a charge of desertion or other offence against military discipline, it is sufficient to prove that the accused received the pay, or did the duties of a soldier, without proving his enlistment or attestation. And the mutiny act specially provides that no person, who for six months has received pay and been borne on the strength and pay list of any regiment or corps, or depôt or battalion of a regiment or corps (of which the last quarterly pay list, if produced, is declared to be evidence), is entitled to claim his discharge on the ground of error or illegality in his enlistment or attestation, or on any other ground whatsoever, but, on the contrary, shall be deemed to have been duly enlisted and attested.⁴

Of Presumptive Evidence.

Evidence, according to the effect produced on the judgment,

is Direct, or

873. Proof is either positive, or presumptive and circumstantial. Positive proof arises from direct evidence, which if true establishes or overthrows a fact immediately in question. Presumptive proof arises from circumstantial evidence, that is, evidence which directly proves some fact, in itself not

(3) 1 Phillips, 381. *Rex v. Gardner*, 2 Campbell, 513.

(4) Mut. Act, sec. 58.

immediately in question, but the truth of which indirectly proves or disproves some other fact, which is immediately the subject of investigation, or is a reason for or against the probability of such other fact. Presumptive proof, therefore, is an effect produced by the concurrence of circumstances given in evidence, which common sense points out as tending to a probable result: it is an inference that a particular fact has taken place; a consequence or conclusion, to which the mind is led, from the ordinary or probable effects resulting from certain causes; or which the mind arrives at by a comparison of results with causes. As there are necessarily many shades of presumptive evidence, the degree of confidence to be placed on it depends on the degree of probability of the occurrence, as arising from, or taken in connection with, the imputed cause, and on the number of facts, not depending on each other, but, though distinct, concurring to render the event likely. Beccaria has accurately remarked that when all the proofs of a fact are dependent on one, the number of proofs neither increase nor diminish the probability of the fact; for the value of the whole is reduced to the value of that on which they depend; and if this fail, they all fall to the ground. But when the proofs are distinct and independent of each other, the probability of the fact increases in proportion to the number of proofs; for the falsehood of one does not influence the other.⁵

Presumptive.

Effect of
Presumptive
Evidence.Several proofs
dependent on
a particular
proof, derive
their weight
from it alone;

874. The value of presumptive evidence may be said to depend on, and be proportionate to, the number and strength of the links by which it is connected with the main fact in issue. The value of a multiplied series of consequences, or a variety of chains, if connected only with an individual link, and not carried separately home to the facts in issue, can be derived from that particular link alone; and if it fail, or its connection with the facts in issue be broken, the value of the chain of evidence must obviously be entirely destroyed.

value of
presumptive
evidence;

875. It has been well observed, by the author before quoted, that *moral certainty* is nothing more than probability, but probability such as is termed certainty, because every man of sense assents to it necessarily, from habit springing

Moral
certainty.

from the necessity of action and preceding all speculative theory. Thence he argues, that the certainty, which is required to convict an offender, is precisely that which influences or determines every man in the most important acts of his life. He remarks, that this moral certainty is more easy to feel than accurately to define; and so completely does he consider that *moral certainty* is the effect of feeling rather than the result of study or the application of acquired theories, that he prefers, as less fallible, ignorance judging from feeling, than science deciding from thought and reflection.⁶

Presumptive evidence should be admitted cautiously.

876. A concurrence of well authenticated incidents may, in some cases, carry as clear, or even a clearer, conviction to the mind, than positive testimony, unconfirmed by circumstances, could have done. "Circumstances cannot lie." Presumptive evidence must, notwithstanding, be ever held as a secondary kind of proof, and only to be allowed when the fact cannot be proved directly; it should be admitted cautiously, and, when received as proof of guilt, should be such as to exclude a rational probability of innocence. When the nature of the case justifies the admission of presumptive evidence, the rule of law, *that evidence must be confined to the points in issue*, must necessarily be relaxed, as before remarked, when referring to this maxim.

Presumptions of law.

877. But besides presumptions of fact, which suppose in each case an independent act of reasoning, there are certain presumptions of law, which will stand good until the contrary is proved. The law presumes that every man is innocent, until the contrary is proved; that a man may be induced to confess himself guilty when innocent, by the hope and promise of pardon; and the like.

Presumptive proof of the payment of money;

878. A receipt for subsequent rent is presumptive proof that rent, for a former period for the same premises, has been paid.⁷ Proof of the settlement of a soldier's accounts, for a particular month, would, in the absence of contrary evidence, be presumptive proof that he had been settled with for any previous month, since the orders of the army direct that a soldier should be settled with monthly. Proof of the existence of an order in an orderly book, it being shown that

of the existence of an order;

(6) Beccaria, s. 14.

(7) 1 Phillips, 492.

it is the duty of the party daily to inspect the same, is presumptive proof of notice or the delivery of an order, but obviously admits of contrary proof. Proof that a soldier belonging to a draft which embarked to join the service companies of a regiment abroad, and that he was apprehended after the transport had sailed, and at a distance from the port of embarkation, has been held by the highest authority sufficient to justify a conviction for desertion, the prisoner not offering any explanation of his absence. of desertion ;

879. There is a general presumption in criminal matters, that a person intends whatever is the natural and probable consequence of his own actions.⁸ Presumption of intention ;

880. Where an act is done injurious to another, malice (that is, a purpose to injure,) is *primâ facie* to be presumed in the person doing that act; thus on a charge of murder, the law presumes malice from the act of killing, unless the prisoner justify or extenuate the act.⁹ of malice ; charge of murder ;

881-9. On a charge for *disgraceful conduct in wilfully maiming or injuring with intent to render unfit for the service*, the intent must be collected from circumstances, and, in default of other evidence, it may be presumed or inferred from the act of maiming or injuring. Examples might readily be multiplied, were it necessary, but it will be evident, that in every case, intention can be but matter of presumption, arising either from the facts stated in the charge, or from collateral facts appearing in evidence. on a charge of wilfully maiming.

(8) 1 Phillips, 474.

(9) 1 Phillips, 474 and 475.

CHAPTER XX.

LEGAL PROVISION FOR ATTENDANCE OF WITNESSES AND
PRODUCTION OF DOCUMENTS ; AND AGAINST FALSE
OATHS.

Attendance
of witnesses
enforced
by law.

Witnesses
duly sum-
moned and
not attending,
or withholding
evidence,
are liable to
attachment,

890. It is the duty of the judge advocate, or president, as the case may be, to summon the witnesses who may be required either on the part of the prosecution or the defence. It is provided by the mutiny act, that all witnesses, "as well civil or military," so duly summoned, "who shall not attend on such courts, or attending shall refuse to be sworn, or being sworn shall refuse to give evidence or not produce the documents under their power or control required to be produced by them, or to answer all such questions as the court shall legally demand of them," shall be liable to be attached in the Court of Queen's Bench in London or Dublin, or the Court of Session, &c., in Scotland ; or courts of law in the colonies or elsewhere respectively, in like manner as if such witnesses, after having been duly summoned or subpoenaed, had neglected to attend upon a trial in any proceeding in the court in which complaint may be made.¹

must attend
unconditionally,

891. Formerly the clause ran *in any criminal proceeding*, but when the mutiny act was recast in 1829, the word *criminal* was omitted: it may be inferred that this omission did not alter the intention of the act, the penalties, incurred by neglecting to attend courts martial, still being such as arise from neglecting to attend a trial in *any* proceeding, and, consequently, in a criminal one. It is well known that, in *criminal* proceedings, the demands of public justice supersede every consideration of private inconvenience, and witnesses are bound unconditionally to attend the trial upon which they may be summoned. They cannot lawfully

(1) Mut. Act, sec. 13.

refuse attendance on the ground of not having received or been tendered their expenses,² except where the process is served in one of the parts of the United Kingdom for the appearance of the witness in another of the parts;³ it therefore follows, that in all cases (saving the exception just stated,) witnesses failing to attend⁴ courts martial, being duly summoned, though their expenses be not tendered, are liable to be proceeded against by attachment.

subject to attachment.

892. Military witnesses failing to attend or withholding evidence are moreover amenable to military law for such conduct, to the prejudice of good order and military discipline, as the military offence does not merge in the civil misdemeanor in consequence of the provision in the mutiny act as to attachment.

Military witnesses failing to attend punishable for offence against discipline.

893. Cases having arisen in which officers holding the high and responsible appointments of governor and commander of the troops, and being invested with a warrant from the sovereign for convening general courts martial, have declined to attend and give evidence on trials held under their authority, when duly summoned by the judge advocate for that purpose, the matter was referred to the proper authority, and Lord Hill was advised that officers so circumstanced are not privileged from giving evidence before a general court martial, and that being invested with the royal warrant, and being the persons who have convened the courts martial and who are to confirm or disapprove of the proceedings, they are not exempted from the duty of attending as witnesses when summoned, and answering such questions as may be legally put to them.⁵

Governors or commanders of troops holding warrants for convening courts martial

are not exempted from the duty of attending as witnesses thereat;

894. The circular upon the above subject continues: "There are no doubt many questions, which might be put to other witnesses, which could not be put to governors and commanders of the troops, as they could not be compelled to disclose, nor ought they to be permitted to disclose, confidential official correspondence or correspondence touching the officers of their government, or to give any information which, on the

but are not compellable to answer questions objectionable on the score of public policy.

(2) 2 Phillips, 441.

(3) 45 Geo. 3, c. 92.

(4) A witness must attend himself, pursuant to his summons; it is no excuse for his non-attendance that he employed a person to watch the pro-

ceedings of the court, who neglected to give him notice in due time.—*Rex v. Fenn*, 3 D. P. C. 547.

(5) Circular to Governors, &c.—Military Secretary, Horse Guards, 23rd February, 1837.

ground of public policy, they are bound to withhold, but there is no rule of law which exempts altogether the governor or commander of the troops in a colony from giving evidence before a court martial or any court of justice."

although it has not been made appear that their evidence is essential;

which point was expressly raised,

and drew forth a notification of the liability to trial by courts martial of persons vexatiously summoning commanders of the troops as witnesses.

Summons, form of, not essential,

895. In the year 1854, the commander-in-chief in India, having been summoned as a witness for the defence on the trial of a subaltern in the 32nd regiment "with deference demurred at the requisition so made upon him, until he had been furnished with the assurance of the court of its being their opinion that his attendance as a witness was essential to the cause of the prisoner."⁶ In the following year a circular to commanders of the troops abroad informed them, with reference to the circular of the 23rd February, 1837, that a question having recently arisen "whether some distinct qualification may not be thought advisable to be attached to the instructions conveyed in the circular to the effect that in all cases the competency of the party so summoned to bear witness with reference to any one fact included in the charges should be ascertained by competent authority before the summons is admitted to be valid," which had been referred to the proper legal authority, that officer suggested the expediency of appending to the said circular the following paragraph, viz. "It is however to be observed that if any person, who is subject to military law, should cause the commander of the troops to be summoned to give evidence before a court martial, and it should manifestly appear that such person must have then well known that the evidence of such officer could not be needed for the purposes of justice, such person will thereby render himself liable to be arraigned before a court martial on a charge for conduct to the prejudice of good order and military discipline"—and Lord Hardinge, concurring in this view of the case, desired that the paragraph above quoted may be considered and taken to be part of the said circular.⁷

896. No form of summons is set forth, but it should obviously state the time and place precisely of the assembling of the court, and might command the witness to lay aside all pretences and excuses and appear at the trial, on pain of

(6) Memo. by Sir W. M. Gomm, Simla, 16th Oct., 1854.

(7) Circular, Military Secretary, Horse Guards, 15th March, 1855.

the penalties declared in the mutiny act.⁸ The summons is served by the provost marshal general on courts martial attended by the judge advocate general, and, in other cases, by the provost marshals, their deputies, or non-commissioned officers appointed for the duty, or upon civilians, in certain cases, when more convenient, through the intervention of the police force, or local functionaries, at the request of the military authorities.

by whom
served.

897. The summons should be served personally on the witness, particularly if not subject to military law, and in reasonable time before the day of trial, that he may suffer the less inconvenience from his attendance on the court.⁹ Notice to a witness in London, at two in the afternoon, requiring him to attend the sittings in Westminster in the course of the same evening, has been held too short, but a person, present in court, may be summoned as a witness without previous notice.¹ If the witness, whose attendance is required, be a married woman, it will be necessary to serve the summons upon her personally, the service upon her husband is not held sufficient.²

Summons
served
personally.

898. All persons duly summoned by the officiating judge advocate of a general court martial, or by the president of courts martial other than general, are privileged from arrest during their necessary attendance in or on, and in going to, and returning from, courts martial, in like manner as witnesses attending any of Her Majesty's courts of law are privileged, and if unduly arrested, it is imperative on the court out of which the writ or process issued by which such witness was arrested, to discharge him.³ A reasonable time is allowed to the witness for going and returning and, in making this allowance the courts are disposed to be liberal.⁴ In the ordinary courts of law it is not necessary that a witness should have been served with a subpoena, if, upon application to him, he consent to attend without one. But it has not been decided that this applies to proceedings before courts martial; the terms of the statute, by which protection is afforded,—*all persons duly summoned*

Witnesses
privileged
from arrest.

(8) Form. Appendix, XIII.

(9) 2 Phillips, 427.

(1) 2 Phillips, 427.

(2) 2 Phillips, 428.

(3) Mut. Act, sec. 13.

(4) 2 Phillips, 428.

as witnesses,—do not include witnesses attending without a summons.

Summons to
produce writ-
ings;

documents
in possession
of adverse
party.

899. If any person has in his possession or under his control any papers, letters, accounts, returns, orders, books, writings, or other documents which are thought necessary to the trial, a special clause must be inserted in the summons to attend, called by lawyers a *duces tecum*, requiring him under the like penalties to bring them with him. The prosecutor may, in this way, be required to produce documentary evidence at the instance of the prisoner. The prisoner, however, cannot be compelled to furnish evidence against himself, but the prosecutor may call on him, through the judge advocate or the president, to produce any documents in his possession, and if, after proof of a reasonable notice, they are refused, secondary evidence of the contents may be admitted.

Witness
must bring
documents
required
by summons,

and produce
them in obe-
dience to the
decision of the
court.

900. A witness served with a summons is obliged to attend; and though it will be a question for the consideration of the court, whether he ought to be compelled to produce the writings in his possession, yet he ought to be ready to produce them, if ordered by the court; and in case of disobedience, without sufficient cause, will be liable to an attachment: or a military witness would be subject to arrest and subsequent trial by a court martial.

Military
witnesses,

901. Instead of a personal service of the summons, military witnesses, if officers, are occasionally summoned by letter from the judge advocate; if soldiers, the judge advocate addresses a letter to their commanding officer, to direct their attendance, who, when requisite, makes the necessary application for a route or order through the usual channel.

before minor
courts martial.

902. In the case of minor courts martial, military witnesses for the prosecution, and also any whom the prisoner may require for his defence, are generally warned to be in attendance on the assembly of the court, in order to prevent the delay incident to a legal summons from the president.

in arrest or
confinement,
or imprisoned
in military
custody;

903. Officers under arrest, and soldiers who are confined or imprisoned in military custody, may be produced as witnesses, on the order of the commanding officer. Military offenders under sentence of imprisonment by a court martial, in a common goal, may be removed in military custody, for the purpose of giving evidence before a court martial, as for

removal to another place of confinement; ⁵ and soldiers confined in a military prison may be removed for this purpose on the order of the general or other officer commanding the district in which it is situated.⁶ Persons, whether civilians or belonging to the service, who may be detained in the custody of the civil power, either on a civil or criminal process, may be brought by a writ of *habeas corpus*, or an order of a secretary of state of one of the judges of the superior courts, for examination as witnesses before a court martial, in like manner as they may be brought up before magistrates or courts of record.⁷

Military witnesses in common gaols; in military prisons.

Witness in custody of civil power.

904. Officers attending courts martial at a distance from their quarters receive the travelling and daily allowances, subject to the conditions specified in the royal warrant, and in the explanatory directions thereto annexed.⁸ Non-commissioned officers or soldiers ordered to attend as witnesses, at a distance, in every case receive the usual marching money.

Expences of witnesses:

officers;

soldiers.

905. However expedient and reasonable it may be, that civilians attending to give evidence in furtherance of public justice, should be compensated for unavoidable expences incurred; and poor persons also, for their loss of time; yet, except on foreign stations, neither the president nor any court martial has power to decide as to the propriety of their receiving payment of their expences, nor are they in point of law entitled to any compensation;⁹ being obliged, as

No express provision for the expences of civilian witnesses at home.

(5) See § 784.

(6) Letter, War Office, 14th July, 1847.

(7) 43 Geo. 3, c. 140, s. 16; and 17 Vict. c. 30, s. 9.

(8) Royal Warrant, Marching and Travelling Allowances, 23rd Dec., 1857. The explanatory directions point out, "19. Officers found guilty by courts martial must pay the expence of witnesses summoned in their defence. 20. In the case of officers acquitted of the charges preferred against them, the expence of such witnesses will be paid by the public. 21. In the case of courts martial founded on personal disputes between officers, the expence of witnesses will not be borne by the public." It is, however, understood that, in special cases (as where the prisoner is wholly without means of reimbursing them), the claims of witnesses continue to be

favourably considered, if they attended *bonâ fide* in obedience to the summons; but in no case where their being summoned was in any way a collusive transaction.

(9) By the stat. 7 Geo. 4, c. 64, it is provided that, in felonies and certain misdemeanors, the court may order payment of the expences of persons who may appear to prosecute or give evidence, whether a bill be, or be not, preferred. The provisions of this act have been greatly extended by the 14 & 15 Vict. c. 85, and more recent acts. These provisions of the statute law, therefore, so far as the attendance of a witness is concerned, tend to confirm the previous well established principle, that, in criminal cases, witnesses must unconditionally attend, since the question of expences becomes a subsequent consideration for the court.

Civilian
witnesses
at home.

before observed, (§ 891) to attend and give evidence unconditionally. The secretary at war, however, had previously entertained claims on the part of civilians, both for the prosecution and defence; and, on the certificate of the officiating judge advocate, as to the time employed in attending the court, usually allowed the expences, or a sum in lieu of them, to the witnesses for the prosecution, and sometimes for the defence. The latest war office regulations provide that, "Claims for the expences of witnesses, whether civilian or military, in attending courts martial at home must be clearly stated and forwarded with the recommendation of the president of the court, so far as he considers the claims to be just and reasonable, for the decision of the secretary of state."¹

Authority for
the payment
of civilian
witnesses,
interpreters,
&c., abroad,

906. With respect to the payment of the expences of civilians summoned as witnesses, &c., before military courts on the several foreign stations, the following regulations were established by the lords of the treasury in 1833:—

According
to the rates
established
in civil courts.

"At any station where there may exist a tariff regulating the amount to be paid to witnesses summoned before *civil courts*, or where there may be any other established mode of dealing with such claims, such tariff or established practice should be made the criterion of settlement for civilian witnesses attending military courts, the president of the court certifying in each case that the same is in conformity thereto, but where no such tariff or established mode of settlement exists," their lordships were "of opinion that the actual expences of the parties for their conveyance to, and in returning from, the place, where the court may sit, should be allowed; so far at least as they might not, in the opinion of the president of the court, have unnecessarily resorted to a mode of conveyance superior to their respective stations, or conditions in life; and secondly, with regard to their personal expences on the road, and during their necessary detention at the place of the court's session, that they should

Principle of
payments in
other cases,

of travelling
expences;

personal
expences,

It were to be wished that the principle of these enactments had been extended to the case of witnesses attending courts martial, especially witnesses not military.

At naval courts martial, witnesses not subject to the naval discipline act, receive payment of "reasonable ex-

pences" from the judge advocate, who is repaid, under the direction of the president, by the paymaster of the flagship at the port where the court martial is assembled.—*Naval Regulations*, p. 102.

(1) Explanatory Directions, 23rd Dec., 1857, par. 18.

receive rates of daily allowance depending on the station of the individual or the special circumstances (if any) of each case, but in no instance exceeding *ten shillings* per diem; that in the case of persons proceeding by sea, and paying a certain sum to the master of the vessel for their conveyance, *including their subsistence*, the sum so paid (subject to the control of the president of the court, upon a consideration of the station in life of the party) should, in conformity with those principles, be allowed, the daily allowance for personal expences of course not being in this case issuable; and no allowance whatever is to be made to persons residing at, or conveniently to, the place where the court may be held.”²

according to
a daily rate,

or actual sum
paid during
passage;

none allowed
to persons
on the spot,

Witnesses taking False Oaths or Declarations.

907. In addition to the provision which is made for the compulsory summons of witnesses and against their withholding legal evidence, as above specified, the mutiny act also declares that witnesses taking a false oath or declaration before courts martial “shall be deemed guilty of wilful and corrupt perjury,” and renders them liable, on conviction before a competent court of criminal jurisdiction, to the penalties incidental thereto, and, if officers or soldiers, to punishment by court martial.³

Witnesses
examined by
a court martial
and committing
perjury
are punishable
by the civil
tribunal, or a
court martial;

908. Those persons, who, by the operation of special statutes (§ 444), are permitted to make a solemn affirmation or declaration, under the provisions of the same statutes, incur the penalty of wilful and corrupt perjury for making a false affirmation or declaration.

and equally so
when excused
from taking an
oath.

909. Courts martial, under the extended powers now conferred by the mutiny act in this respect,⁴ may order a military witness, committing perjury before them, into arrest or confinement. With respect to witnesses not subject to *martial law*, and who may commit perjury before a court martial, the court can do no more than draw the attention of the superior authority to the circumstances in order to the taking of ulterior measures in the civil courts.

Courts martial
powerless as
regards civil-
lians, except
to suggest
prosecution
before compe-
tent tribunal,

(2) Circular, C. S., dated, Treasury Chambers, 24th May, 1833.

(3) Mut. Act, sec. 96.

(4) See before, § 127.

CHAPTER XXI.

OF THE COMPETENCY AND INCOMPETENCY OF WITNESSES;
AND OF THE EXCLUSION OF EVIDENCE IN PARTICULAR
CASES.

The Competency and Credibility of Witnesses.

Objections to
competency;

910. WHEN a witness is produced, and before he is sworn, any objection to his competency ought to be taken, if it be known; but it is held that the objection may be raised any time it may be discovered during the trial.

to credibility;

911. Objections to the *credibility* of a witness must be reserved for the defence, or the reply of the prosecutor. An exception to the credibility of a witness does not prevent his testimony being received.

objections
arising from
infamy or
interest do
not affect the
competency,
but raise the
question as to
the credibility
of a witness
so impeached.

912. Lord Denman's act, passed in 1843, has most beneficially relieved courts martial, in common with other courts of law, from the necessity of considering the very perplexing questions, as to the incompetency of witnesses by reason of infamy and interest, which arose under the previous law. It lays down the broad principle that it is desirable that "the persons who are appointed to decide upon the facts on issue should exercise their judgment on the *credit* of the witnesses adduced, and on the *truth* of their testimony;" and enacts "that no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, . . . but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial . . . or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a

witness may have been previously convicted of any crime or offence."¹

913. This act excepted the actual parties: Lord Brougham's act, (14 & 15 *Vict.* c. 99,) repeals this exception (*sec.* 2); but makes a proviso (*sec.* 3) as to criminal proceedings, here given at length, because it declares the law, which is binding on courts martial, in the very clearest terms:—"Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

No prisoner before a court martial is competent or compellable to give evidence for or against himself,

nor his wife.

914. The provisions of this act afford a legal sanction for receiving the sworn testimony of the parties under the thirteenth article.² There had however been previous examples of this, which, to say the least, were not in accordance with the existing law of evidence as held to be binding in civil courts.

Appellant and respondent competent.

915. It had always been a rule in criminal prosecutions before courts of civil judicature, that the injured party might be a witness, even though, on conviction of the prisoner, he became entitled to a reward; and upon the same principle a prosecutor on a trial before a court martial (though he may himself have originated the charges, or may, in any other way, indirectly be materially interested in the result,) had always been a competent witness;—the court in this, as in all cases of suspicion, judging of the degree of credibility to be attached to his testimony.³

Prosecutor competent,

although materially interested in the event of the trial.

916. It is a rule which prevails on courts martial, as in criminal courts, that where several persons are charged separately with the same crime, though it be perjury in swearing to the same fact, any one, not on his trial, may be admitted as a witness for the others.

Persons separately charged on identical crime.

917. The evidence of accomplices and accessories against

(1) 6 & 7 *Vict.* c. 85, s. 1.

(2) See § 340.

(3) See before, § 571-2.

Testimony of
accomplices
admissible, but

requires
confirmation,

and more
especially as
regards the
person of the
prisoner.

Prisoners
arraigned
together

are rendered
competent
by separate
finding, or by
a plea of
guilty.

Prisoner
desiring

their associates in crime, as also of the principal against his accessory, (as, for instance, of the thief, against the receiver,) is admissible, and must of necessity be admitted in many cases, but it should always be received with great jealousy and caution. Although a conviction upon the unsupported testimony of an accomplice may, in many cases, be strictly legal, it is the prudent practice of our courts to require it to be confirmed, by unimpeachable testimony, in some material part, and more especially as to the identity of the person, or persons, against whom such evidence may be received; ⁴ but where the testimony of an accomplice is thus confirmed, it affords ground for believing that he speaks the truth in other points, and with respect to circumstances, as to which there may be no confirmation.⁵

918. Persons jointly arraigned are incompetent witnesses for each other; yet, in criminal prosecutions, where there are several defendants on trial, and it appears, on closing the case for the prosecution, that against one or more of them there is no evidence to convict, the court will, in its discretion, take a separate verdict of not guilty; and such defendant or defendants, so acquitted, are admitted to give evidence on the trial of the remaining prisoner, or prisoners.⁶ Upon the same principle a defendant who has pleaded guilty is an admissible witness for or against his co-defendants.⁷ The rule in civil courts, though founded on reason and justice, cannot, from the necessity of the approval of the sentence in order to its taking effect, and the incidental delay, be acted on to the full extent by military courts; but if, on a court martial, the evidence against the prisoner, whose testimony is deemed essential, should prove insufficient to convict him, there can be little doubt but that the court may proceed to acquit him, and adjourn to allow time for confirmation; and on its promulgation reassemble and proceed with the examination of the desired witness.

919. The regular course for a prisoner to adopt, who may

(4) Confirmation as to the circumstances, only confirms a man's own avowal, that he was concerned in the offence. Confirmation as to the individual, can alone connect the prisoner with it;—and it must always be borne in mind that accomplices are necessarily of tainted character, and may be

tempted to accuse a person, wholly innocent, from motives of revenge, or to screen themselves or a guilty associate. 1 Phillips, 89-101.

(5) 1 Phillips, 97.

(6) 1 Phillips, 51-2.

(7) Archbold, 234. 1 Phillips, 53.

desire to avail himself of the evidence of a person involved in the same charge, would be, on the receipt of the copy or the charges, to urge the necessity of his separate trial with the authority ordering the court martial; and, if such representation were not attended to, an application to the court would still be open. Mr. M^cArthur quotes a case directly in point; it occurred at a naval court martial, where confirmation is not necessary to render the sentence operative; but it is very clear, that the law of the case, being essential to justice, and not a matter of form only, must be precisely the same with reference to all courts martial: William Muspratt, a seaman, was arraigned with nine others, for mutiny on board His Majesty's ship *Bounty*, also for desertion and running away with the ship. The evidence for the prosecution did not materially affect two of the number, Byrn and Norman, upon which Muspratt, by advice of counsel (afterwards Lord Erskine,) urged their acquittal, to enable him to call them as witnesses, setting forth the ordinary practice of criminal courts in such cases. The court refused the application upon the principle of its being contrary to the usage of courts martial to give sentence on a particular prisoner until the whole of the defence of the prisoners was gone through. Muspratt, and five of those tried, were found guilty and sentenced to suffer death; Byrn and Norman, and two others, were acquitted. Whereupon Muspratt petitioned the Admiralty, praying that he might have an opportunity afforded him of laying his case before the Throne for mercy. The Admiralty deemed it expedient to lay the facts before the attorney-general (afterwards Lord Chief Baron Macdonald), the solicitor-general (afterwards Lord Eldon), the counsel to the Admiralty (Mr. Broderick), for their joint or separate opinions, whether there were any objections to the carrying the sentence into execution against Muspratt. They delivered their opinions separately; they concurred that it was the custom of criminal courts, in such cases, for the judge in his discretion to direct the acquittal of an innocent person, to enable him to give testimony, and they inclined to the opinion that Muspratt was entitled to the benefit of a similar proceeding in the case in question; the two former forbore to speak positively, as they suggested the propriety of submitting the case to the judges; the

testimony
of soldier
involved in the
same charge
how to act.

Case of
Muspratt.

Case of
Muspratt.

latter delivered his decided opinion that Muspratt was entitled to the advantage of the testimony of Byrn and Norman, and advised the Admiralty to interpose in his behalf in obtaining the royal mercy. The twelve judges were appealed to, and in consequence of their opinion, Muspratt obtained His Majesty's pardon; four of the other prisoners, who received judgment with him, were executed.⁸

Want of
discretion;

920. Incompetency from defect of understanding may arise from idiocy; or confirmed insanity; or immaturity of intellect, as in the case of children.

insanity;

921. In lucid intervals, persons of disordered intellect, whose minds may have sufficiently recovered, are competent to give evidence.⁹

admissibility
of a child.

922. The admissibility of a child to give evidence is regulated, not by his years, but by the development of his mental faculties; by his acquirement of religious knowledge; and by the sense he may entertain of an oath;—subject to which a child of any age may be examined as a witness.¹⁰

(8) It appears by a letter of Lord Erskine, prefixed to James's Collection of Sentences of Courts Martial, that the respite of the prisoner was directed by His Majesty on the direct application of the prisoner's attorney:—"One of the mutineers at Portsmouth . . . was tried with others, and as it was likely that against *one of them who knew the innocence of the person in question*, no evidence could be given, I advised the attorney who was employed by him, if that turned out to be so, to apply to the court, on the authority of my opinion, to direct such person to be acquitted, and then to permit him to establish, by his evidence, the innocence of the man in question. This application being accordingly made, the court declared itself to be satisfied that the course proposed was agreeable to the practice of the courts of criminal law, but not of courts martial; they, therefore, refused to adopt it, and, having no other defence, he was sentenced to be executed. Being then on a visit in the Isle of Wight, and the attorney from Spithead having communicated to me this decision, I despatched him immediately to Weymouth with a representation to the late King, in which I humbly suggested to His Majesty that the court

martial ought to have conformed to the rule established in the common law courts, and implored the king, in the name of the unhappy man who had been unfortunately convicted, to respite the execution, and to submit his case to the twelve judges for their decision on it. His Majesty, with his usual humanity and enlightened attention to the demands of justice, instantly sent back the attorney with the respite prayed; and the judges having decided unanimously that the conviction was *unwarranted*, the man was set at liberty. There can be no doubt that neither in this case nor in any other of a similar description could there have been an appeal to any of the courts of justice. It belongs to the *king alone* to abrogate or confirm the sentences of courts martial; but the judgment of his late Majesty, so remarkable during his long reign for his faithful and enlightened administration of justice, ought to be received as a precedent hereafter; and I feel great pleasure, therefore, in making this communication; being deeply interested in everything which concerns the noble profession of my earliest youth."

(9) 1 Phillips, 8.

(10) 1 Phillips, 8. When the child

923. As to religious belief, a man is held incompetent to give evidence if he disbelieve in the existence of God ; or if he profess not any religion which may bind his conscience to tell the truth. The proper mode of examining a witness for the purpose of trying his competency on the ground of religion, is not to question him as to his particular opinions, but to enquire whether he believe in the existence of God, and the religious obligation of an oath ;¹ and it is held that he is to be admitted to if he believe in the existence of any god, who will reward or punish him in this world, although he may not believe in the True God, or in a future state ;— “ But it is not sufficient that he believe himself bound to speak the truth, merely from a regard to character, or the interests of society, or fear of punishment by the temporal law.”²

Defect of religious principle.

Mode of examination as to religious belief of witness.

924. The law does not merely require the performance of a ceremony in administering an oath to a witness, but also that he should acknowledge it as an obligation to speak the truth, and, therefore, if a witness does not acknowledge any religion, the consequence must necessarily be, that he cannot be sworn. Should the oath be administered in the usual form, before the witness's belief be enquired into, he may afterwards be asked whether he considers the form of the administration of that oath binding ; if the answer of the witness be in the affirmative, he cannot³ be asked respecting any other mode of administering an oath, which may be deemed by some more binding.⁴

The requiring of an oath implies that a belief in its obligation is necessary.

925. Husband and wife (§ 913) are not admitted as witnesses for or against each other, in any trial, where *one of them* may be *party* ; nor are they permitted to give evidence where the evidence may tend to *criminate* each other collaterally. The one is a competent witness in a cause between *other persons*, the result of which may contingently

Husband and wife reciprocally incompetent for or against each other,

but may give evidence against third

has not appeared sufficiently to understand the nature and obligation of an oath, judges have often put off the trial, directing that the child in the meantime shall be properly instructed, but in a case at the Old Bailey, in 1849, Baron Alderson refused to postpone the trial for this purpose, “ stating that all the judges were now of opinion that it was an incorrect proceeding ; that it was like preparing or getting up a witness for a particular

purpose, and on that ground was very objectionable.”—1 *Phillips*, 10 ; so also *Archbold*, 232.

(1) *Phillips*, 17.

(2) *Starkie*, 116 ; so also 1 *Phillips*, 16.

(3) *The Judges, Queen's Trial* ; and see § 451.

(4) As to forms of oath before courts martial, &c., see § 443-453 ; and as to relaxation of the general law in certain colonies, see § 444 (5).

parties,
though the
result may
contingently
affect one
of the married
parties.

not if benefit
be direct.

On a criminal
offence against
the person of
either, hus-
band or wife a
competent
witness;

wife of the
prosecutor
competent
witness.

Woman
cohabiting
with party, not
incompetent;

and essentially benefit the other; as a woman, whose husband had been before convicted, was admitted to give evidence against the prisoner, though she expected, that in the case of his conviction, her husband would receive a pardon.⁵ But the benefit must not be direct; two being indicted for burglary, and a witness for the prosecution identifying both the prisoners, they each set up a distinct *alibi*; when it was held, that the wife of one was not a competent witness to prove the *alibi* of the other, and it was decided by a majority of the judges that the witness had been properly rejected, because, though she did not in terms give evidence for her own husband, yet her testimony went to shake the credit of the witness for the prosecution.⁶

926. As an exception to the general rule, it may be stated, that a wife may give evidence against her husband, in a prosecution for any criminal offence against her person. So also, a woman, taken away and forcibly married, may give evidence for or against the offender, for she is not legally his wife.⁷ The dying declarations of a wife are evidence against her husband on his trial for her murder.⁸

927. It has been erroneously imagined by some military men, that on a charge before a court martial for a breach of military discipline, the wife of the prosecutor is not a competent witness. Her testimony may be suspicious in an equal degree with that of the prosecutor; but there is no rule or reason to exclude it. The proceedings being at the suit of the crown, as in criminal cases, her evidence would be admitted upon the same principle as that of the prosecutor. Any attempt to deceive may be exposed with greater facility by the opportunity afforded of cross-examining two witnesses to the same fact, than if one only was admitted to give evidence; if, therefore, the accused be innocent of the charge, the advantage of separately examining both husband and wife is entirely in his favour.

928. The circumstance of a woman cohabiting with a party, though it affects her credit, does not afford ground for rejecting her testimony. The rule is, that she shall not be excluded unless the lawful wife of the party.¹

(5) 1 Leach, 151.

(6) Rex v. Smith, before the twelve judges, 1826.

(7) Hawk., c. 42, s. 9. 1 Phillips, 83.

(8) 1 Phillips, 81.

(1) 1 Phillips, 106-7.

929. No other relation but that of husband and wife *excludes* from giving evidence: the parent may be examined on the trial of the child, the child on that of the parent; the master for or against the servant, the servant for or against the master; the testimony may be suspicious, but the witness not incompetent.

other relation does not incapacitate.

930. The counsel and attorneys for parties cannot be called on, nor, indeed, would they be permitted, to reveal secrets confided to them by their clients. So likewise an interpreter, who is present at conversations between a foreigner and his attorney, is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him as the medium of such confidential communications, even after the cause is at an end, for the purpose of which the confidence was placed. But the protection arising from confidential communications to legal advisers and attorneys, actually employed in the case, does not extend to information they may possess, acquired independently of, and not arising from, those professional connections. This privilege is the privilege of the client, and therefore if he waive it, the professional adviser cannot refuse to answer such questions as the court may demand of him, and, on the other hand, though he may be willing to do so, he is not allowed to divulge his client's secrets unless he does consent.

Counsel, attorneys employed, and interpreters, how far privileged.

the privilege is that of the client, and can be waived only by him.

931. Persons who are the channel, by means of which detection of crime is effected, are not to be unnecessarily disclosed; a spy, therefore, is not obliged to name his employer.² A witness for the crown cannot be compelled to state through what channel he made a disclosure to government, either immediately or mediately.³

Exclusion of disclosures prejudicial to public interest.

932. A person in the employ of government cannot be required to divulge the nature of his instructions, or any confidential communication. On the trial of Watson for high treason, a clerk of stores in the ordnance department, who had resided many years in the Tower, was called for the purpose of proving that a plan found at the lodgings of the prisoner was a plan of part of the interior of the Tower; having proved this to be the case, he was afterwards asked, upon cross-examination, whether another printed plan

Persons in the employ of government, how privileged.

(2) 1 Phillips, 133.

(3) 1 Phillips, 136.

Witness for
crown.

(which was shown him) upon a regular scale, was a correct plan of the Tower, for the purpose of showing that such maps might be purchased without difficulty in the shops in London; but the court held that it might be attended by public mischief, to allow an officer of the Tower to be examined as to the accuracy of such a plan.⁴

Minutes of
court of
enquiry not to
be called for
without con-
sent of crown.

933. It has been decided that the minutes of evidence, taken in writing before the privy council, and the proceedings of a military court of enquiry, cannot be called for without the consent of the law officers of the crown.⁵ It may, therefore, be presumed, that on ordinary trials by courts martial, the minutes of courts of enquiry cannot be called for without the consent of the superior military authority which convened the court of enquiry.⁶

Irrelevant
questions
respecting
third persons.

934-9. It may be added in this place, although such questions ought obviously to be rejected as irrelevant, that questions tending to injure and degrade third persons not connected with the trial, are not permitted.⁷

(4) 1 Phillips, 137; and see § 894.

(5) *Horne v. Lord F. C. Bentinck*, judgment affirmed on appeal to Exchequer Chamber. See before, § 331.

(6) See a decision by the judge advocate general, § 1001.

(7) 1 Carr. N. P., 100.

CHAPTER XXII.

OF EXAMINING WITNESSES AND DISCREDITING THEIR TESTIMONY.

Examination of Witnesses.

940. WITNESSES at courts martial are necessarily examined on oath, except in certain cases already mentioned (§ 444), and, invariably in open court in the presence of each¹ member and of the parties to the trial. The court is thereby enabled to observe their demeanour, inclination, and understanding; points essential to the formation of a correct judgment as to the value of their testimony: the adverse party is also afforded an opportunity of objecting to their competency (§ 573-9), or of trying their credibility by cross-examination.

Witnesses
examined in
open court,

941. It is not competent to a court martial to examine a witness by deputation of part of their number; nor to receive evidence on interrogatories. Under particular circumstances, in the event of an important witness being prevented from attending at the appointed place of assembling, the court may, with the concurrence, or on the order, of the authority convening it, assemble at or adjourn to the quarters or residence of the desired witness.

not by a
deputation of
the court.

942. At courts martial, no witness, except the prosecutor, is permitted to be present during the examination of another;

Witnesses
examined
separately.

(1) This is not the case in civil courts of English judicature, but either party, at any period of a cause, has a right to require that the unexamined witnesses shall be sent out of court. (*Southey v. Nash*, 7 C. P. 632.) In Scotland, so strictly is this rule observed, that if a witness has been present in court during the examination of another witness, so as to hear his evidence, he will be rejected. (2 *Hume, Criminal Law of Scotland*, p. 365.) Mr. Tytler, guided by this custom of

the courts of Scotland, has applied the principle to courts martial; he states (p. 248) that the circumstances of witnesses being present during previous examination, would of itself afford a valid objection to their testimony, being a species of subornation. It is conceived that this author has not sufficiently recollected that the practice of *English* courts of judicature can alone be referred to when the custom of courts martial cannot be confidently relied on.

Witnesses
examined
separately.

consequently the influence which the testimony given by one may tend to create in another is obviated, and collusion rendered more difficult. When a prisoner had, with the consent of a brother officer, whose name was on the list of witnesses, solicited the court to permit his assistance during the trial, the request was refused, and the court, in its remarks subjoined to the sentence, animadverted on the request, observing as to the conduct of the officer in authorizing the application: "That the paramount duty of an officer, and more especially of an officer of rank," (the officer referred to was the major of the regiment,) "is to support discipline by adherence to the principles of established rules, rather than indulge an impulse however amiable, perhaps to the prejudice of justice, or countenance misconduct by injudicious commiseration."² In confirmation of this rule, it may also be noticed that the adjutant-general and quarter-master-general, who had belonged to the expedition to Buenos Ayres, had been summoned, on the part of the prosecution, as witnesses on the trial of Lieutenant-General Whitelocke: the lieutenant-general, conceiving they might be of use to him in his defence, submitted to the court that they might be permitted to be present during the trial; the judge advocate, who prosecuted, observed that the evidence of those officers was material for the prosecution; the court, after deliberation, determined that Lieutenant-General Whitelocke's request could not be complied with, but that he might speak to those gentlemen as often as he thought proper.³

Exceptions;
witness
inadvertently
present during
the examina-
tion of
another;

943. This custom of examining witnesses separately, though highly desirable and conducive to the development of truth and the detection of falsehood, is not so rigidly observed as to exclude the testimony of a person who may, by inadvertence, have been present at the examination of other witnesses. It may, in certain cases, render his testimony suspicious, but does not render him incompetent.

witnesses may
be confronted.

944. It is competent to a court martial to confront any two or more adverse witnesses;⁴ that is, to call into court, at the same time, any two or more contradictory witnesses,

(2) G. O. on the promulgation of the sentence of a general court martial on Ensign Alex. Sutherland, 91st regiment, 10th July, 1813.

(3) Lieutenant-General Whitelocke's trial, p. 2.

(4) 3 Blackst. Com., 373.

and to endeavour to reconcile their testimony, by reading over to each the evidence of the other, and by requiring an explanation of such parts as are inconsistent or contradictory, in order to ascertain, as far as possible, the real truth of the case;⁵ but this proceeding would not be advisable, nor perhaps just, till the close of the cross-examination.

945. The prosecutor,⁶ being necessarily present during the examination of all witnesses, if required to give evidence for the prosecution, is sworn immediately after his opening address as prosecutor (§ 571); nor would it be proper,⁷ at any other stage of the proceedings, to admit his examination or deposition in chief, *except* when called as a witness for the defence.

Prosecutor, if witness, examined before other witnesses.

946. A prisoner may insist on the testimony of the prosecutor (§ 915), and may also call upon him to produce documents of any kind, which he may deem necessary for his defence.

Prisoner may insist on the testimony of the prosecutor.

947. A member of a court martial, as a judge or juror (§ 511), is a competent witness and may be sworn to give evidence in favour of, or against a prisoner, at any stage of the proceedings; it is however to be avoided, if foreseen. It need scarcely be observed, that no communication by a member in closed court, can be received; he must be sworn as other witnesses, in open court, and be subject to cross-examination; neither ought the private knowledge of any fact to influence the particular verdict of a member; he is sworn to administer justice strictly according to the evidence before the court, not his private grounds of belief concluded in his own breast, which it is very possible may not amount

Member of a court martial may give evidence.

(5) *Adye*, 101.

(6) The rule would apply in the event of a witness for the prosecution acting as judge advocate, which it is obvious ought never to be allowed, if it can possibly be avoided. — See § 463.

(7) A proceeding, which is believed to be equally opposed to the customs of courts martial and civil courts of judicature, is reported to have been permitted on the general court martial which was held at Cork, in December, 1833, for the trial of Captain Wathen, of the King's Hussars. All the papers

of the day, which reported the proceedings in full, stated that the prosecutor offered himself on the ninth day, and was accepted as a witness in support of the *three first charges*. When it is considered that he had opened his case by an address, and had for eight days examined witnesses on *these charges*, there can be but one opinion as to the inadvertence of the proceeding: nor ought this deviation from the well-established custom of the service to have any effect in unsettling a practice which is essential to the due administration of justice.

to legal evidence.⁸ It was formerly held that jurors might find according to the best of their own knowledge, but this doctrine is now exploded, and the practice obtaining is, that if a juror knows anything of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.⁹

Whether a court martial can originate evidence.

948. It is a question, very often raised, whether or not courts martial are competent to originate evidence; that is, to call into court a witness not produced by the parties before a court. There is no doubt but that the court may, at any period of the trial, recall any witness for further examination, if any question occur to the court or is suggested by either of the parties; and it would also seem that the custom of the service would justify the calling, as a witness, any person mentioned in the evidence before the court, who may be at hand, and whose examination might elucidate a special point which wanted further proof; but it is apprehended that this is the utmost extent to which a court would be authorized to go. A court martial might involve itself in an inextricable labyrinth, were it to stay proceedings and adjourn in order to obtain testimony (§ 580). Much less would a court martial be justified (should it appear that the testimony produced by the prosecutor was insufficient or inconclusive,) in receiving evidence, in support of the prosecution, after the prisoner had been placed on his defence (§ 601-3), except for the purpose of meeting new matter which has been adduced by the prisoner.

Examination through an interpreter.

949. Witnesses must necessarily, in many cases, be sworn and examined by means of an interpreter (§ 472-4); and the court may also at any time resort to an interpreter, if such assistance appear desirable to them; or if the parties to the trial or the witness himself should make a request to this effect, and the court should concur in the propriety of the application.

Deaf and dumb witnesses.

950. A deaf person, or one who has lost the power of speech, may, respectively, be questioned or give evidence by writing or by signs.

951. A deaf and dumb person, who enjoys the full use

(8) Starkie, 816.

(9) 3 Blackst. Com., 375.

of his reason, and is not otherwise incompetent, may be examined by writing, or by signs, through the medium of a person capable of conversing, and sworn to interpret faithfully.

952. In those commands where it is not forbidden by standing orders, the charges against the prisoner or an abstract of them are sometimes read¹ to the witness about to deliver his testimony, more particularly before inferior courts martial, but should the reading of the charge instruct the witness how to answer and have the effect of a leading question, as for example, on a trial for disrespect, the prisoner being charged with the utterance of particular expressions and the precise words being specified, the words should be omitted, as should in all cases any detail, whether of circumstances, gestures or expression, to which the prisoner might reasonably raise an objection.

Charges
sometimes
read.

when the
practice is
not forbidden.

When neces-
sarily avoided.

953. A witness after being regularly sworn or making affirmation (§ 440-453), is first examined by the party producing him, which is termed the examination in chief: he is then cross-examined by the adverse party (the prisoner having the option of deferring his cross-examination to the close of the prosecution); the former party re-examines on such fresh matter as may have been elicited by the cross-examination; and, finally, the court put such questions as they may deem expedient.²

Order of the
examination of
witnesses,
in chief;

cross-examined;

re-examined;
examined by
court.

954. Witnesses before courts martial, immediately on being sworn, are sometimes directed by the president to relate what they know respecting the charge against the prisoner. In such cases, the witness, either to connect what he has to offer, from the influence of feeling or from other cause, is often betrayed into *hearsay*, and induced to make statements which cannot be legally received in evidence; it therefore becomes necessary, in recording the evidence, to distinguish between the parts of the witness's statement

Advantage of
examining by
means of
question and
answer.

(1) The charges are read, in some cases, before the administration of the oath, at other times after; but the former, if the charge be read at all, seems in so far the preferable practice, as, by it, the matter before the court, touching which the witness expressly swears, is directly brought to his consideration, whilst taking the oath. Reading

the charges has never been a custom invariably observed by courts martial, and indeed the only argument in favour of the practice would seem to be, that, in the case of witnesses for the prosecution, it may, in some instances, save the prosecutor the trouble of introductory questions.

(2) See before, § 573-581.

which can be legally received, and the parts which cannot; and although the duty may be ably performed by a judge advocate or president, yet impressions are sometimes made upon individual members, which the admissible parts of a witness's statement may not be calculated to convey; whereas, in the ordinary mode of question and answer, as on the one hand, illegal questions would be thrown out; so, on the other, answers not bearing on the question would be immediately objected to; the practice, therefore, of examining by question and answer, though probably more tedious in the first instance, tends to greater precision in the admission of evidence, and may also ultimately save the time of the court by excluding extraneous matter, or by operating as a check to its admission.

Parole evidence only as to facts immediately within the personal knowledge of witness, which may be tested by further questions or on cross-examination.

Exceptions: belief of witness.

Opinion of witness,

receivable in evidence;

955. The general rule is that a witness can be examined only as to facts which he personally recollects, and which became known to him by the evidence of his senses,—what he has himself seen, heard, &c. This is implied, even if not expressly asserted, by the witness, and he may be questioned, or may be cross-examined as to the sources of his knowledge of any fact, and his reasons for recollecting it.

956. But, even in giving evidence in chief, there is no rule which requires a witness to depose to facts with an expression of certainty that excludes all doubt in his mind. For example, it is the constant practice to receive in evidence a witness's belief of the identity of a person, or of the fact of a certain handwriting, being the writing of a particular individual, though the witness will not swear positively to these facts. It has been decided that a man, who falsely swears he thinks or believes, may be indicted for perjury.³

957. A further exception arises in cases where scientific or professional men are examined as to matters of opinion. The opinion of a witness, generally speaking, is not evidence. He must, as above stated, depose to facts within his personal knowledge, which facts the court weighs and applies by the judgment, individual and collective, and by the professional knowledge, of the members.⁴ Yet, on

(3) Starkie, 273.

(4) As one illustration of this principle,—a witness (as has been observed

on official authority) may not, on a trial for desertion, "characterize" the prisoner's absence "as desertion."

questions touching a particular science or art, evidence need not, and from the nature of the case, often cannot, extend beyond opinion and belief, and the witness is therefore permitted to give his opinion, as a surgeon concerning the cause of death, or the state of a patient, in which case he is always questioned as to the best of his judgment, opinion or knowledge. On a trial where the defence is insanity, a surgeon may be asked, whether such and such appearances (proved by other witnesses) are symptoms of insanity. But it has been doubted by several of the judges, if it could be asked, whether, from the other testimony given in the case, the act with which the prisoner was charged was an act of insanity, as that was the very point to be decided by the jury.⁴ The judge advocate general, on the trial of Colonel Quentin, remarked: "Every question is admissible of a military man, where it is founded on local knowledge or circumstances which are not within the reach of all the members of the court; but where it is merely a question of military science, to affect the officer who is undergoing his trial, it is obvious that the court is met for no other purpose but to try that; and that they have before them the facts in evidence, on which they are to ground their conclusions."⁶

as to questions touching a particular science or art;

of medical men,

in cases of insanity;

questions arising from special information of witness.

958. In cases affecting the conduct of the accused, either

This, it may be observed, is *matter of inference*, and precisely the point which it rests with the court to determine according to the evidence. The examination should be confined to the fact of the prisoner's absencing himself, and to such other facts, relevant to the charge, as may be within the *knowledge* of the witness.

(5) *Rex v. Haswell, Bass. & Ry.*, 458. With reference to the case of *Reg. v. M^r Naughten*, which has been elsewhere more particularly adverted to (§ 587), the judges were asked:

"Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of

doing the act, whether he was acting contrary to law, or whether he was labouring under, and what, delusions at the time?"

On which question the answer was:

"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, which are admissible. But when the facts are admitted or not disputed, and the question becomes one substantially of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on, as a matter of right."

—75 *Lords' Journals*, 401, ff.

(6) Printed trial, p. 48.

In cases affecting conduct, how far opinion may be required;

as to opinion of witness.

Questions involving opinions depending on occurrences,

as to engineering or the effect of artillery,

as to the seaworthiness of a ship.

Witness may refer to his

as to deportment or language, it is perfectly proper, and often necessary, to require a witness to declare his opinion, because such opinion may be derived from the impression of a combination of circumstances occurring at the time referred to, difficult, if not impossible, fully to impart to the court; but it would be manifestly improper to draw the attention of a witness to facts, either derived from his own testimony or that of another witness, and to ask his opinion as to their accordance with military discipline or usage, because the court, being in possession of facts, are the only proper judges of their tendency. On the trial of Lieutenant-General Whitelocke, questions involving opinions, formed at the period to which the facts related, were decided by the court as admissible, after the due consideration of a protracted argument on the case in writing, put in by the prisoner.⁷ These questions depended on the particular knowledge of the witness from his presence on the spot, and at the time of the occurrence of the circumstances, to which the question had reference. They were not grounded on an hypothesis framed so as to elicit an opinion depending on military science generally. Such questions ought never to be admitted. It is clearly the duty of the court to examine as to facts, and to apply those facts by their own professional knowledge and experience, to the solution of the question in issue, and not to admit the opinion of a witness when, by more patient investigation, they could acquire such information on the subject, or such a detail of facts, as might render them competent to form a correct judgment. It is, however, perfectly proper to put questions involving opinion, to an engineer, as to the progress of an attack, or to an artillery officer, as to the probable effect of his arm, if directed as assumed: these questions though attaching to military science, are not of that nature to be presumably known to each member of a court martial. So in a civil court, a shipbuilder has been admitted as a witness to give his *opinion* as to the seaworthiness of a ship, on *the facts stated* by others.⁸ Commercial men are also called to prove the meaning of a particular expression in commercial papers.⁹

.959. No witness is permitted to read his evidence, but he

(7) Printed trial, pp. 463, 477, 478.

(8) 1 Phillips, 522.

(9) Charaud v. Angerstein, Peake, 61.

may, to refresh his memory, and particularly with reference to dates, numbers, sums of money, or any complicated mass of facts, make use of, and occasionally refer to, a written memorandum, made by himself at the time of, or recently after, the fact; or, if made by another, examined by him whilst the fact was fresh in his memory.¹ A witness, however, is always required to swear positively as to the fact; or that he had a perfect recollection that the fact was truly stated in the memorandum or entry at the time it was written. If, on referring to a memorandum not made by himself, he neither recollects the fact, nor the truth of the account in writing, and cannot speak as to the fact, further than as finding it noted in a written entry, his testimony would be objectionable, as hearsay; the witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said.² The opposite party, when cross-examining, is permitted to inspect the writing referred to by a witness, where it has not had the effect of reviving his memory, so that his testimony depends upon his inference³ from his memoranda.

own notes at the time of transaction;

opposite party may inspect such memoranda.

960. Every witness, whether on his examination in chief or on the cross-examination, has a natural right to explain and make clear the evidence which he has given, and if any doubt should arise after his examination has closed, the court will call upon him for such explanation.⁴ It is, however, clear that such explanation can only be entered upon the proceedings as an addition to the evidence previously recorded; any contradiction must, for the sake of justice, and for the information of the officer whose duty it is to confirm the sentence, still appear (§ 478); but such apparent contradictions may be reconciled or explained by the witness. During or previous to cross-examination, it would be manifestly incorrect to place a witness on his guard, by suffering his previous deposition to be read to him; but, for the purpose of explanation, courts martial afford all possible facilities; and in this view and for the purpose of giving an opportunity of correcting (§ 578) any accidental mistake or omission on the part of the judge advocate or the

CORRECTION BY WITNESS.

Witness may explain,

but previous entries not to be erased.

(1) 2 Phillips, 483.
(2) 2 Phillips, 483.

(3) 2 Phillips, 481.
(4) M'Nally, 388.

officer who may be writing the proceedings, it is the usual practice to read over to a witness, (invariably, if either he or the parties desire it,) the whole of his deposition, before he leaves the court.⁵ Such explanation by a witness is considered in the light of an examination in chief, and he is subject to be cross-examined, and re-examined by the party originally calling him, with reference to any fresh statement he may make.

**PRIVILEGE OF
WITNESS IN
REFUSING TO
ANSWER:**

in all cases where the answer might tend to criminate or suggest a link in proof against himself.

Accomplices cannot be examined against their consent, but in the event of a breach of contract, are not protected from the consequences of their own acts.

Privilege in not answering questions degrading to the character of the witness, and not directly relevant to the matter before the court.

961. It is, as already observed, characteristic of our judicial system, and in our military no less than our civil courts, that however relevant the question may be to the matter under enquiry, the humanity of the English law refuses to compel any man to criminate himself or to give information, which, though it could not be used against him in evidence, yet might lead to the obtaining of proofs in support of a charge against himself.

962. Accomplices, therefore, cannot be examined without their consent; but, as they are frequently admitted to give evidence against their associates in crime under an express or implied promise of favourable consideration, or of pardon, they are in so far obliged to give evidence, that if, when sworn as witnesses, they refuse to give full and fair information, "they may be convicted on their own confession."⁶ But even accomplices under such circumstances are not required to answer, in their cross-examination, as to other offences, in which they have not been concerned with the prisoner.⁷

963. The law moreover protects a witness in not answering such questions,—put to him for the purpose of impeaching his credibility and therefore only indirectly bearing on the charge,—as may have a direct and immediate (§ 979) tendency to degrade him by disclosing his infamy or turpitude; but "if the transaction as to which the witness is interrogated, form any part of the issue, he will be obliged

(5) After leaving the court, witnesses occasionally apply to be recalled in order to correct or explain their recorded testimony, such evidence would, in many cases, be received with suspicion, and the witness, as it is almost superfluous to

observe, would in every case be liable to be questioned in order to elicit whether such after-thought were spontaneous, collusively suggested to him, or otherwise.

(6) 1 Phillips, 92.

(7) 2 Phillips, 492; and see § 967.

to give evidence, however strongly it may reflect upon his character."⁸

964. Witnesses may be asked on cross-examination whether they have been convicted and pardoned or punished, for felony (§ 979); but they are not obliged to answer. Their answers may not make them criminal, nor subject them to punishment, but they are matters of infamy, and for the reproach of crimes which are purged "it shall not be put upon a witness to answer a question, whereon he will be forced to forswear or disgrace himself. 'So persons have been excused from answering, whether they have been committed to bridewell as pilferers or vagrants, &c.; yet to be suspected is only a misfortune and shame, no crime.' The like has been observed in other cases of odious and infamous matters, which are not crimes indictable."⁹ So on a trial for rape, the woman is not obliged to answer, whether or not she has had criminal connection with other men; but the prisoner may ask, whether he has had connection with her previous to the alleged rape, and produce evidence of such previous intercourse, if she deny the fact.¹

As to former offences.

Enunciation of general principle.

Rule on trials for rape.

965. All other questions, which may be *legally*² put, the witness is *compellable*³ to answer: even where the result of his answer might be to subject him to a *civil* suit. The 46 Geo. 3, c. 37, declares that a witness cannot refuse to answer a question relevant to the matter in issue, the answer of which has no tendency to accuse himself, or to expose him to penalty or forfeiture, by reason only that the answer to such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit.

Witness is required to answer all other legal questions and cannot refuse to answer on the ground of a civil action or debt.

966. This privilege of *not answering* is the privilege of the witness, and not of the party in whose behalf he may have been summoned, and therefore he may persist in waiving it, and, if he choose to answer, his answer must be received in evidence.⁴

This privilege is that of the witness,

witness may waive it,

967. Where a witness, after having been cautioned that he was not compellable to answer a question which may criminate him, chooses to answer at all, it had been held that he

may claim the protection of the court at any stage of the enquiry.

(8) 2 Phillips, 494.

(9) By Chief Justice Treby, 13 Howell's St. Tr., 534. 2 Phillips, 495.

(1) 1 Phillips, 505.

(2) As to questions which the law will not permit to be answered, see before, § 894, 929-932.

(3) See before, § 890.

(4) 2 Phillips, 490.

is bound to answer everything relative to that transaction ; but on consideration by the whole of the judges, it has been held by a majority that a witness after having answered some questions may stop at any moment and claim his privilege ; and that if the judge nevertheless force him to proceed, what he says cannot be made use of against him in a criminal proceeding.⁵

Questions
tending
to criminate
or degrade
a witness may
be put, but the

968. It would seem that the question, whether a witness is bound to answer a question to his own disgrace, has not yet undergone any direct and solemn decision. If the witness, although not compellable to answer, chooses to give an answer from a desire to exculpate himself from the imputation of crime, the party who asks the question, will be bound by the answer and cannot be allowed to falsify it by evidence.⁶

answer if
made, conclu-
sive.

All questions
entered on
the proceed-
ings whether
answered
or not.

969. All questions put to a witness, whether answered or not, should be entered on the proceedings ; when the witness claims the privilege of not answering, it is for the court to decide whether the question is within the exception ; courts martial also occasionally interpose by apprising a witness, at the time the question is put to him, that he is not bound to answer ;⁷ but in either case it ought to be made appear on the proceedings for the information of the confirming authority, that the witness was not required to answer.⁸

All questions
not within the
rule must be
answered.

Leading
questions
not permitted.

970. Leading questions, or such as instruct a witness how to answer on material points, are not permitted on the examination in chief ; questions which are purely introductory, and the answers to which are not material to the

Introductory.

(5) Starkie, 214. 2 Phillips, 489, 491.

(6) 2 Phillips, 501. "The court is not a court to try a collateral question of crime, and it would be unjust, if it were; for how can the party be prepared with a case of exculpation, or with an answer to any evidence that may be produced to charge him? There is no possibility of a fair and competent trial, upon that subject, and therefore in no instance is it done." By Lord Ellenborough in Watson's case.—*Id.* & 32 Howell's State Trials, 490. See G. O., § 813 (2).

(7) It is to be feared that, in some instances, from a tenderness to the

feelings of persons, not themselves on their trial, this may have been done with the unintentional effect of preventing a legitimate exercise of the right of cross-examination, but a sense of fairness to all parties would seem to point out that this course ought never to be adopted where the unwillingness or hostility of the witness is evident, and he is sufficiently conversant with the practice of courts martial to be aware of his privilege.

(8) It has been elsewhere (§ 934) observed that questions tending to injure and degrade third persons, not connected with the cause, are not permitted.

establishing the point in issue, are not liable to be objected to, as leading; a resort to them often spares the time of the court, by preventing a diffuse preliminary interrogation.⁹ Suggestive assistance, when an omission is evidently caused by a want of memory, as in the case of names, or where a witness is required to enumerate in detail a variety of items, is also allowed, in the discretion of the court, according to the circumstances in each particular case; for which it is impossible there should be precise rules, but it is evident there must be many such cases, which do not fall within the principle of the prohibition of leading questions.¹ Where a witness is evidently in the interest of the opposite party, and is reluctant or unwilling to speak the truth, an examination in chief is permitted to assume something of the form of cross-examination, by the admission of leading questions.

and suggestive questions,

not liable to be objected to as leading questions.

Leading questions to an unwilling witness.

971. Cross-examination is justly regarded as the great test of truth. The opportunities which a witness has had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties and his motives may all be severally examined and scrutinized.² On cross-examinations, questions leading directly to the point are permitted, the object being to sift evidence and try the credibility of a witness; and where witnesses betray zeal for the party calling them, or a backwardness in speaking impartially, there is no fear in extending this license too far: on the other hand, should the witness under cross-examination have evinced a backwardness to declare the truth on his examination in chief, and have betrayed a feeling for the opposite party, the cross-examination is restricted.³

Cross-examination;

great latitude allowed in the mode of putting questions.

972. Mr. Tytler, in conformity with the law of Scotland, would restrict cross-examination to "relevant questions, arising from, and relative to, the evidence already given;"⁴ but, in many cases, this would have a tendency directly opposed to the development of truth, and the detection of falsehood; and would defeat one great end of cross-examination, an opportunity for trying the credibility of a witness.

Importance of this practice.

(9) 2 Phillips, 460.

(1) 2 Phillips, 462; and see § 959.

(2) Starkie, 34.

(3) 2 Phillips, 472.

(4) Essay, 245.

Supposititious
facts;

973. Mr. Peake says, that a counsel cross-examining may, for the purpose of trying the credit of a witness, suppose facts apparently connected with the cause, which have no existence but in his own imagination, and ask the witness if they did not happen. No mischief can arise from this course of examination; for if the witness is determined to speak nothing but the truth, he will deny everything so suggested, and the testimony of every other who is called will confirm him: but it frequently happens, on the other hand, that witnesses who have entered into a wicked conspiracy to defeat justice, and who, having made up their story together, agree on the general feature of the case, will, when examined out of the hearing of each other, by their variations in little circumstances as to which they are unprepared, and by their contradictions, be rendered utterly unworthy of credit.⁶

Caution as to
extent of cross-
examination;

974. It is necessary when adverting to the expediency of permitting, in the cross-examination, questions involving supposititious facts, or matter not previously in evidence, where collusion or conspiracy amongst witnesses may be suspected, to guard against the admission of this principle on other occasions before courts martial, as the frequent result of such procedure would be needlessly to occupy the time of the court; — to protract the proceedings, often to the detriment of the service: — and to weary and annoy the witness.

how far,
always to be
permitted.

A witness under cross-examination may, however, always be questioned in explanation of facts given in evidence by any preceding witness, and also to the motives which might actuate him in giving testimony, or as to the circumstances under which he might have been brought to appear as a witness. For instance, it has been decided not to be irrelevant, to cross-examine a witness as to whether, in consequence of being charged with robbing the prisoner, he had not said that he would be revenged upon him; and, if the witness should deny having used such a threat, evidence may be given to contradict him.

Cross-exami-
nation, how
far limited as
to relevancy,

975. Mr. Phillips observes, With regard to the relevancy to the matters in issue of questions which may be put in cross-examination, considerable latitude is allowed in this respect where the tendency of the questions is to affect the

(5) Peake, 197.

credit of the witness. Thus a witness may be asked questions affecting his own character,⁶ and consequently his credit, though such questions have no relation to the matters in issue. But a witness cannot be cross-examined as to any facts which, if admitted, would be collateral and wholly irrelevant to the matter in issue, and which would in no way affect his credit, and still less can he be examined as to such facts for the purpose of contradicting him by other evidence, and in this manner discrediting his testimony. And if the witness answer such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. This would render an enquiry, which ought to be simple and confined to the matter in issue, intolerably complicated and prolix by causing it to branch out into an indefinite number of collateral issues.⁷

In damaging credit of witness.

976. It is not admissible, in cross-examination, to represent the contents of a letter, and to ask a witness whether he wrote such a letter to any person with such contents, or contents to the like effect, without having first shown the witness the letter, and his admitting that he wrote such a letter.⁸ One or more lines of a letter may be shown to a witness, and he may be asked whether he wrote such part of a letter; but if the witness deny that he wrote such part exhibited, he cannot be examined as to the contents of the letter.¹ If a witness admits a letter to be of his handwriting, he cannot be questioned whether statements, such as may be suggested, are contained in it; the whole letter must be read in evidence.²

Rule as to cross-examination on writings.

977. When a witness has been once sworn to give evidence, though he only prove handwriting, or give no testimony at all for the party calling him, yet may the opposite party cross-examine him.³ But, if a person be called merely for the purpose of producing a written instrument belonging to him, which is to be proved by other evidence, he need not be sworn.⁴

Witness sworn, and not examined, may be cross-examined.

(6) 2 Law of Evidence, 467-8. See before, § 813 (2), a G. O., promulgating the Queen's remarks, occasioned by neglect of this rule.

(7) Starkie, 200.

(8) 2 Phillips, 510. Decision of the judges, Queen's trial. See § 981, 1034.

(1) Decision of the judges, Queen's trial. 2 Phillips, 510.

(2) 2 Phillips, 512.

(3) 2 Phillips, 467.

(4) 2 Phillips, 466.

RE-EXAMINATION:

confined to
the points of
the cross-
examination.

978. As to re-examination, the general rule, laid down in the queen's trial, is, that counsel have a right to ask all questions (and, by consequence, prosecutors or prisoners on courts martial,) which may appear proper to draw forth an explanation of the sense and meaning of the expressions, used by the witness on cross-examination, if they be in themselves doubtful; and also, an explanation of the motive by which the witness was induced to use those expressions: he has no right to go further and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. Mr. Phillips observes: as the object of cross-examining a witness respecting former statements, supposed to have been made by him, is to impeach the truth and credit of his testimony; so, on the other hand, the object of the re-examination is to give him an opportunity of showing the consistency of his statements and of vindicating his character.

IMPEACHING CREDIBILITY OF WITNESS,

by direct
testimony,

by cross-
examination;

979. The credit of a witness may be impeached by directly disproving the facts stated by him; by cross-examination (§ 972-6); by the proof of his conviction for some crime; or, by adducing general evidence that he is unworthy of being believed on oath (§ 980), or by the proof of his having done or said that, which is inconsistent with his statements in this particular instance. As to discrediting the testimony of a witness by direct evidence bearing on the charge, it is unnecessary to dilate. The subject of cross-examination has also been previously considered. With respect to putting in proof the record of a conviction for a crime, with the view of destroying the credibility of a witness, it may be observed, that although Lord Denman's act (§ 912) has had the effect, in every case, of restoring the competency of a witness, who has been convicted of an infamous crime, it cannot operate to retrieve his credibility; the proof of the conviction of crime may more or less influence the degree of confidence to be placed in his testimony, and although in consequence of the difficulty of producing legal proof of infamy, witnesses are not often discredited in this formal manner, cross-examination as to the fact of previous convictions, produces all the effect of discrediting him which can be desired, and equally acts as a

safeguard by warning the court to be cautious in receiving the testimony of an infamous witness.

980. The credit of a witness may be impeached by the deposition of other witnesses, as to his general character,⁵ but not as to particular parts of his conduct, or facts not relevant to the issue; for, though every man is supposed to be capable of defending his general character, it is not likely that he should be prepared to answer to particular facts without previous notice, and the administration of justice would become impracticable, if an enquiry were allowed to branch out into such collateral issues.⁶ The regular mode is, to enquire whether the witnesses have the means of knowing the former witness's general character, and whether, from such knowledge, they would believe him on his oath.⁷ The party whose witness is impugned may cross-examine as to the grounds for such general opinion given, or the opportunities which witness may have had for coming to such conclusions; ⁸ these questions being replied to generally, a further cross-examination into particular instances is inadmissible. The party whose witness is impeached may also in reply or rejoinder, as it may be, bring fresh evidence to support the character of his own witness, or to attack the character of the impeaching witness.⁹

by deposition
to general
character,

but not as to
collateral and
irrelevant
facts.

Party, whose
witness is im-
pugned, may
cross-examine,

or produce
evidence of his
good character.

981. The credit of a witness cannot be confirmed by proof that he has given the same account before,⁹ but it may be impeached, even by the party producing him, by proof that he has made statements on another trial, or out of court, on the same subject, contrary to what he swears at the trial, provided he has been previously cross-examined as to such alleged statements, and provided that such alleged statements are material to the matter in issue.¹ A letter written by him, or a deposition signed by him, may be used as evidence to contradict his testimony, provided the letter be shown to him.²

Impeaching
by statements
out of court.

982. The general rule is this, that whenever the credit of a witness is to be impeached by proof of anything that he has said or done in relation to the matter before the court, he is

Rule as to
impeaching
credit of
witnesses by
fresh evidence.

(5) See G. O. on Lieut. Hyder's Court Martial, § 813 (2).

(6) See before, § 968 (6).

(7) 2 Phillips, 504.

(8) Starkie, 252; 2 Phillips, 504.

(9) Starkie, 253; except in those

cases where an immediate complaint of some personal injury has been made. See § 862.

(1) 2 Phillips, 504.

(2) 2 Phillips, 509. See § 976.

first to be asked, upon cross-examination, whether he has said or done that which it is intended to be proved.³

Party may not directly impeach the credibility of his own witness, but may bring evidence to contradict him.

983. A party cannot impeach the credibility of his own witness by general evidence;⁴ the meaning of which is, that after producing a witness a party cannot prove him to be of such a general bad character as would render him unworthy of credit.⁵ But a party may prove, by other evidence, the truth as to a material fact, relevant to the issue, or he may discredit his own witness, if he prove adverse, by the proof of his having, at other times, made statements inconsistent with his present testimony.⁶

Trifling disagreements in testimony,

as to minute facts,

and in witnesses' impression as to the same transaction.

Cause of venial discrepancies in evidence.

984-9. In weighing the conflicting testimony of witnesses, it ought not to excite surprise that witnesses of fair reputation should differ as to minute points in the relation of facts. An exact agreement in the narration of minute particulars would rather create suspicion of previous contrivance and conspiracy. The non-agreement of witnesses, therefore, on points which are not of a prominent and striking nature, in many cases may be no impeachment of their general credibility, and ought to be carefully distinguished from wilful and corrupt misrepresentations. If venial discrepancies in testimony are met with, relating to positive facts, much more are they to be expected, when witnesses depose rather as to the impression made upon their minds, than as to facts, as on trials arising out of quarrels, or disrespectful conduct to superiors. The words actually employed, independent of deportment, voice and gesture, must often very imperfectly convey an adequate conception of the matter, of which it is important for the court to be informed, and as regards which it is incumbent on them to decide. This variation in evidence (arising from the predisposition of the minds of witnesses to be impressed by, or to retain, facts,) is particularly likely to occur, when by the lapse of considerable time, and probably from conversations relative to the affair in issue, the impression, at first loosely admitted, becomes confused, if not warped, by the preference which a witness may, without any culpable feeling, entertain for one side or the other.

(3) Starkie, 238.

(4) "This would enable him to destroy the witness if he spoke against him and to make him a good witness if he spoke for him, with the means in his

hand of destroying his credit, if he spoke against him."—Buller, N. P., 297.

(5) 2 Phillips, 526.

(6) See § 982; and 17 & 18 Vict. c. 127, s. 22, 23.

CHAPTER XXIII.

OF ADMISSIONS BEFORE COURTS MARTIAL, AND
CONFESSIONS BY PRISONERS.*Admissions in open Court.*

990. THE only admissions, (previous confessions by prisoners not being here included in the term,) which it is of importance to notice with reference to the practice of courts martial, are those which may be made in open court by the parties before the court. These are received in certain cases (more especially, if not exclusively, applying to officers) as conclusive, and, with the exception of a plea of guilt, the legal effect of which will be considered hereafter, (§ 1005), are entered on the proceedings to the exclusion and in the place of more formal evidence.

Admissions,
made in open
court,

by officers,

and received in
lieu of formal
evidence.

991. The orders of the army require that notwithstanding a prisoner may plead guilty the court should receive such evidence as may afford a full knowledge of the circumstances,¹ but the spirit of this order in no way interferes to prevent courts martial from continuing to receive admissions as to collateral or comparatively unimportant facts, which are not in dispute, but which it may be required to prove either² on the prosecution or the defence. It is the practice to allow either party to admit the signature of a document, or the truth of a copy,³ in cases where such writings are receivable when proved, also that a promise or permission to a certain effect, or a certain order, was actually given, or a certain letter was sent or received on a certain day, and in other

Such admissions
are confined to
comparatively
unimportant
points,

as to the
reception of
documentary
evidence

or collateral
facts, merely
requiring
formal proof.

(1) Queen's Reg. p. 222, § 543-4.

(2) It is believed that, although in strict law the two cases must stand upon exactly the same ground, it would not accord with the practice of the service that any admission should be

suggested to a prisoner, however true in point of fact, unless the prosecutor was prepared with sufficient and available evidence to prove the point.

(3) See hereafter, § 1046-7.

similar cases where admissions may expedite the proceedings and do not go to the merits of the matter before the court.

Of Confessions by Prisoners.

Confessions,

992. The confession of a prisoner in a criminal case is received in evidence upon the presumption that a person will not make an untrue statement, or admission militating against himself. But as there may not unfrequently be motives of hope and fear operating to this end, and because the confession itself is in many cases liable to mis-construction, or to be mis-reported from ignorance, inattention or malice, statements by prisoners are often excluded from being given in evidence, and they should always be received with caution by the court.⁴

when admitted
as evidence,
of matters
of fact,

not of matters
of law.

993. Voluntary confessions of prisoners, whether made before apprehension or after, whether on a judicial examination or after confinement, whether reduced into writing or not, if satisfactorily proved,⁵ become evidence, and if direct and positive, are sufficient to convict, without any corroborating circumstances.⁶ But, it may be added, a confession is obviously not conclusive evidence against a prisoner, and when it involves a matter of law, is to be received with more than usual caution.⁷

Confessions,
in many cases,
as laid down
by Sir M.
Foster, ought
to be of small
effect in proof
of crime.

994. A confession is by law admissible in evidence, even when made in the course of conversation, and when the party may not be upon his guard and apprised of its danger; but in the words of Mr. Justice Foster, "Hasty confessions, made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured: words are often mis-reported, whether through ignorance, malice or inattention — it mattereth not to the defendant — he is equally affected in either case: they are extremely liable to mis-construction, and withal this evidence is not, in the ordinary case of things, to be

(4) 1 Phillips, 402.

(5) A single witness is in all cases sufficient in law, except in those cases where the overt act or offence must be proved by two witnesses (§ 868),

when the confession must be proved by two witnesses.

(6) 1 Leach, 349.

(7) 1 Phillips, 406. See § 186(4), 957 (4).

disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is, confronted."⁸

995. Any threat or promise, or hope of pardon, held out or sanctioned by a magistrate, or other person in authority, or concerned in the charge, will prevent the admission of any consequent confession, but a confession is receivable in evidence, if it has been made in consequence of promises or threats by a person, who has nothing to do with the apprehension, prosecution or examination of the prisoner.¹ The law presumes that, under a threat or promise, a prisoner may confess himself guilty of that of which he is innocent, and, therefore, it excludes his confession; but if confession, though extorted, lead to the discovery of circumstances, which make against the prisoner, it is no objection to their being given in evidence, that they were discovered in consequence of information obtained by undue inducements.³

Confessions made under undue inducements are not admissible.

Must be voluntary.

996. A confession made in hope of being thereby permitted to turn Queen's evidence, is not a *voluntary* confession, and is, therefore, inadmissible:² but it seems that the confession of a person admitted as Queen's evidence may be received against him, if he refuse to give evidence on the trial of his confederates in crime.⁴ A prisoner, who had made a confession to a constable in consequence of a promise, was taken before a magistrate, who, knowing what had taken place, cautioned him against making any confession before him; the prisoner, notwithstanding, did make a confession to him, which confession was admitted in evidence against the prisoner, though it did not appear that the magistrate told the prisoner that his first confession would have no effect, and he *might*, therefore, *have acted* under an impression that, after having once acknowledged his guilt, it was useless to retract.⁵

Confession by Queen's evidence,

receivable in case of a breach of contract,

or after caution by magistrate:

997. A confession resulting from the state of a prisoner's mind, acted on by the exhortation of a chaplain, when regularly made before a magistrate, after due caution as to its

need not be spontaneous;

(8) Foster, 243.

(1) 1 Phillips, 411. The rule of exclusion extends to all cases, where the prisoner has been told that it would be better for him if he did confess, or worse for him if he did not, or any language to that effect has been used; and to all statements

made by a prisoner which may affect him criminally though in terms they charge another person, or purport to be a refusal to confess.

(2) 1 Phillips, 415.

(3) 2 Leach, 637.

(4) 1 Phillips, 413; § 962.

(5) Rex v. Howes, 6 C. & P. 404.

may be given
from religious
considerations;

or in answer to
questions,

or when drunk.

Deception does
not exclude
prisoner's letter
obtained by
means of it,

nor exclude
a verbal
confession.

Confessions to
legal advisers
are privileged
communications.

Evidence given
by prisoner
not on oath.

probable result, and of the futility of relying on any expected favour from it, has been received, and, accompanied by corroborating proof, sentence of death and execution has followed.⁶ Similar evidence might have been admitted on a military trial; and equally so, if the confession had been made to an officer or other person. It should clearly appear that the exhortation to tell the truth, by whom ever made, was unaccompanied by any hope of favour in connection with the charge being held out or implied. A confession obtained without either threat or promise, by questions put by a police officer, is admissible in evidence, although he had, of his own authority, locked up the prisoner (a boy) without food for several hours;⁷ and where a prisoner made a confession whilst under the effects of intoxication, it was held receivable, however little weight it might have.⁸

998. If a prisoner, who is committed on a charge of felony, ask the turnkey of the gaol to put a letter into the post, addressed to the prisoner's father, and the turnkey promise to do so; and instead of that, on receiving the letter, he conveys it to the visiting magistrates of the gaol, who forward it to the prosecutor, this letter is evidence against the prisoner, notwithstanding the manner in which it was obtained.⁹

999. A prisoner being in custody on charge of murder, a fellow prisoner pressed him to tell "how he murdered the boy." The prisoner put his fellow on oath not to reveal what he told him, and then made a statement of the circumstances; it was held that this statement was admissible against the prisoner confessing.¹

1000. It has been elsewhere observed that statements made to legal advisers, are privileged, but they may be examined as to what they know apart from communications to them in their professional capacity.²

1001. The evidence which a person gave before a committee of the House of Commons has been admitted *against him* on a trial for misdemeanor.³ It might therefore be argued that a statement made by a person before a court of enquiry, may afterwards be admitted against him in a

(6) *Rex v. Gilham*, by the twelve judges.

(7) *Rex v. Thornton*, Moody, C. C. 27.

(8) 1 Phillips, 420.

(9) *Rex v. Derrington*, 2 Carr. & P. 418.

(1) *Rex v. Shaw*, 6 C. & P. 372.

(2) See before, § 930.

(3) *Rex v. Merceron*, 2 Stark. 366.

criminal court or on a trial before a court martial, as neither the House of Commons nor a court of enquiry administer an oath. Subsequent decisions may possibly be cited, as authorities for the rejection of such evidence even in ordinary criminal courts;⁴ but it is of the less importance to advert to them, as the custom of the service is decidedly against the admissibility by a court martial. During the proceedings of a general court martial upon an officer of the Royal Marines, at Chatham, in October 1829, the judge advocate general, who was consulted as to whether an officer who had been member of a court of enquiry held to investigate the subject of the trial could be examined as to any confession then made by the prisoner, had "no hesitation in saying that in his opinion, to treat as a confession any thing" the prisoner "may have said or urged in the course of the proceedings referred to, would not be just or prudent, and that therefore" the officer who had been a member of the court of enquiry "ought not to be called on the particular point alluded to."

Evidence given by prisoner not on oath, whether admissible against him, in criminal courts,

or courts martial.

Admissions before courts of enquiry are not admissible before courts martial.

1002. The law is clear that the confession of a prisoner upon oath cannot be received against him, but it does not appear a settled point whether admissions made on oath by a person not in custody for an offence, are receivable against him on his subsequent trial: the more recent decisions of the judges seem to make against their admissibility, at least where the prisoner was not cautioned beforehand;⁵ and, at all events, so far as the practice of courts martial is concerned, although it is not known that any official opinion

Examination of on oath not receivable as confessions.

(4) With reference to a case which occurred a few years since in the West Indies, where an officer, who had laid himself open to a charge of manslaughter, was improperly subjected to examination before a court of enquiry, the then judge advocate general, in the opinion which he gave condemnatory of the proceeding, seems to imply, that what he then said might have been given as evidence against him on a criminal prosecution in the civil court.—See extract, § 335-6.

(5) Where a statement made by a prisoner upon oath, at a time when he was not under suspicion, was tendered in evidence, the judge received it. *R. v. Tubby*, 5 C. & P. 530. On

a more recent occasion, when the foregoing case was referred to, where the prisoner and others were examined (no person being specifically charged with the offence), and the prisoner was sworn, and made a statement, and at the conclusion of the examination was committed for trial, the judge refused to receive in evidence what the prisoner had said on that occasion. *R. v. Lewis*, 6 C. & P. 530. When the defendant, on a cross-examination in a civil action, was compelled by the judge to answer questions tending to criminate him, it was held that the admissions so obtained could not be used against him upon his trial on a criminal charge. See § 967.

has been given on the subject, it is believed that such evidence has not in any instance been received, although cases have occurred where courts martial have rejected a proposal to prove, and use against prisoners, evidence which had been given by them as witnesses before courts martial, and also where the evidence was given in proceedings before the civil power.⁶

General rule as to admissions and confessions.

1003. It is a general rule that the whole of admissions or confessions must be taken together, so that what is given in evidence may be neither more nor less than what the prisoner intended. Thus, if a person says, "that he did owe a debt, but that he had paid it," such an admission will not be received as evidence to prove the debt, without being also evidence of the payment. Or a prisoner may admit killing a man, and state facts which may reduce it to manslaughter. In these, and all similar cases, the statements favourable to a prisoner, or explanatory of his conduct, cannot be kept back, but must be received, as well as those militating against him, but still this is like all other evidence, and it is for the jury in this, as in all other cases, to decide what parts they believe to be true.⁷

Confessions not evidence against accomplice.

1004. The confession is evidence only against the person confessing, not against accomplices.⁸ Several persons being charged with a criminal offence, one of them, in the presence of the others, stated before a magistrate that he himself, and one of the others, committed the offence; the person thus charged did not deny it; it was held that this was no evidence against him.⁹

(6) The credit of a witness may be impeached by the proof of contradictory evidence on a former occasion.—See before, § 981.

(7) Lord Tenterden says, "It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction and have a very different tendency to what would be produced if the whole were heard; for one part of a conversation will frequently serve to qualify and to explain the other."

(8) *Rex v. Appleby and others*, 3 Stark. N. P. C. 33.

(9) Upon trials for treasonable and other conspiracies, mutinies, and other cases where several persons have entered into the same criminal design, statements by one confederate are receivable against another, when they are in the nature of, or when they accompany acts for which all the parties are responsible; but they are not receivable when they are in the nature of narratives, descriptions, or confessions.—See before, § 821-3, 861 & 864.

Plea of Guilt.

1005-09. A plea of guilt is a confession in the fullest degree, and will take effect on the deliberation of the court: but, as elsewhere observed, it is wisely and mercifully directed, that a court martial do notwithstanding receive and report such evidence as may afford to the authority, which has discretion in carrying into effect the sentence, a full knowledge of all the attendant circumstances. If "a voluntary confession made by a prisoner to any person, at any time or place, is strong evidence against him, and, if satisfactorily proved, sufficient to convict without any corroboratory circumstances," (and this is an admitted rule of evidence,) much more must a plea of guilt on a solemn arraignment be admitted as conclusive. A court martial, failing to receive and report such tendered evidence as may afford a full knowledge of circumstances, would, doubtless, commit a great breach of military duty; but, in the eye of the law, a decision arising from a plea of guilt, notwithstanding the rejection of evidence, may be maintained; and any sentence resulting therefrom, if confirmed and acted on, and not otherwise illegal, could not expose the members of the court martial to any penalty, on any proceeding in a court of common law. The superior courts will not permit courts of inferior jurisdiction, created by statute, to adopt any rules of evidence, but such as are recognized by them, or provided by statute. The mutiny act, by itself, and through the instrumentality of the articles of war, ascertains the jurisdiction of courts martial; and the general orders for the army may, and often do, lay down rules as to the mode of conducting the proceedings; but the rules of evidence can only be ascertained by reference to the established law of the common law courts, and express provisions in the mutiny act and articles of war.

Plea of guilt
conclusive.

CHAPTER XXIV.

OF DOCUMENTARY OR WRITTEN EVIDENCE.

PUBLIC WRITINGS.

Records;

matters *quasi*
of record.Private
writings.Records
proved by
office copies.Certificate of
acquittal or
conviction of
officers and
soldiers in
courts of ordi-
nary criminal
jurisdiction.Convictions by
courts martial.

1010. WRITINGS are either — Records technically so called; — Matters *quasi* of record, such as the proceedings of the superior courts, not being records, the journals of the two houses of parliament, the proceedings of inferior and foreign courts, the gazette, public and official books and records, and other similar documents; and lastly — Private, which must be understood to include what in common parlance are known as official letters, as well as writings originating in transactions between individuals in their private capacities, accounts, receipts, &c.

1011. Office copies or copies of records, authenticated by a person appointed for the purpose, as provided by several statutes relating to them, are evidence of the contents of the original upon the credit of the officer authorized to furnish it, without evidence being given of the copy having been actually examined.

1012. The mutiny act provides that “whenever any officer or soldier shall have been tried by any court of ordinary criminal jurisdiction, the clerk of such court or other officer having the custody of the records of such court, or the deputy of such clerk, shall, if required by the officer commanding the regiment to which such officer or soldier shall belong, transmit to him a certificate setting forth the offence of which the prisoner was convicted, and the judgment of the court thereon if such officer or soldier shall have been convicted, or of the acquittal of such officer or soldier, and shall be allowed for such certificate a fee of three shillings.”¹

1013. The articles of war provide that the court martial book, or the defaulters’ books, or certified copies, shall be *sufficient* evidence of previous convictions by courts martial;²

(1) Mut. Act, sec. 39. Art. War, (2) Art. War, 157. See § 560, 158, 159. 626-9.

and where a previous conviction of habitual drunkenness is stated in any charge for that offence, such evidence "must" be given to the expulsion of other proof.³

1014. On trials for habitual drunkenness, the defaulters' books, or "satisfactory evidence" of the entries therein, are sufficient evidence of every instance of drunkenness but the last;⁴ and there is no doubt but that in any case where a soldier pleaded that he had been "punished, ordered to suffer punishment, imprisonment or forfeiture" similar evidence would be admissible.⁵

Evidence of instances of drunkenness,

and of summary awards by commanding officers.

1015. The articles of war provide that the record of the absence of a soldier and of the declaration of the court of enquiry (§ 347) thereon, or a copy, shall, on a trial of such soldier for desertion, be evidence of the facts therein recorded.⁶

Record of declaration of court of enquiry evidence against deserter.

1016. By the fiftieth article, the record signed by the commanding officer, to whom a soldier makes a confession of desertion, or a copy, certified as therein directed, is sufficient evidence of the making of such confession.

Record of confession of desertion.

1017. The mutiny act provides that the last quarterly pay list, if produced, shall be evidence of a soldier's having been borne on the strength of any corps.⁷

Quarterly pay list.

1018. It has been ruled, on the highest authority, that the proceedings of a court martial, duly authenticated, may be given in evidence against a prisoner tried for prevarication.⁸ In like manner, it may be presumed, that a court martial would be justified in receiving similar evidence on a trial for perjury. It is hardly necessary to observe that the proceedings in such cases are evidence against the prisoner, only to prove his having made the deposition which is stated to have been false, and not to prove its falsehood by the recorded evidence of other witnesses who were examined on the same trial.

Proceedings evidence of the deposition of a witness on his trial for prevarication, &c.

1019. Mention has already been made of circumstances under which, on the formation of a fresh court, the evidence of a witness, before a court which has been dissolved, may be read over to him and entered on the proceedings.

Evidence on a former trial read over to, and acknowledged on oath by a witness, may be entered on proceedings.

1020. Depositions, as a general rule, are not admissible

(3) Art. War, 82, § 272.

(4) See before, § 221.

(5) See § 560-1.

(6) Art. War, 170.

(7) Mut. Act, sec. 58.

(8) Judge advocate general, 19th March, 1859.

Depositions or
interrogatories.

evidence. In civil courts there are, however, exceptions under certain circumstances, which are little likely to arise on trials by courts martial; indeed never, except on trials for criminal offences in default of a civil court. Depositions relative to felonies and misdemeanors, taken on oath, in presence of the prisoner, who must have had an opportunity of cross-examining the witness, and in conformity with certain statutes,⁹ are admitted in evidence, if, upon being produced in court, they appear to have been duly taken, it being also proved to the satisfaction of the court, at the time of the trial, that the persons who made them are dead, incapacitated by illness from travelling, or kept out of the way.

Proceedings
of court of
enquiry not
evidence.

1021. It might appear absolutely preposterous to observe, that the proceedings of a court of enquiry cannot be admitted as evidence *of the facts* detailed in the information recorded by it; yet as a court martial has fallen into this error, it may be advisable to notice, that such irregularity has been condemned in general orders in the following terms, from which it may be inferred that, had not the conclusion of the court been justified by unobjectionable evidence, it could not have been supported by deductions from the proceedings of the court of enquiry: "Although the conduct of the court was irregular, in admitting the proceedings of a court of enquiry as evidence on this trial, yet as they appear to have been justified by unobjectionable evidence, in their ultimate conclusion, the Prince Regent was therefore pleased, in the name and on the behalf of His Majesty, to approve and confirm their finding and sentence."¹

Acts of
parliament,
general and
public acts.

1022. Acts of parliament which relate to the kingdom at large, (when they are called *general* or *public*) are not, correctly speaking, the subject of proof in any court of justice, for, being the law of the land, they are supposed to be known to every man; and, therefore, printed copies of such acts and the printed statute books are resorted to by courts of justice, not as evidence to prove that of which every man is supposed cognizant, but for the purpose of refreshing the

(9) 7 Geo. 4, c. 64; 11 & 12 Vict. c. 42. The 13 Geo. 3, c. 63, and 1 & 2 Will. 4, 22, make provision for the admissibility of depositions in certain cases which do not apply to courts martial; and there are other cases in

which depositions are admitted in civil courts which it is equally unimportant to notice here.

(1) G. O. on the promulgation of the sentence on Captain Meredith, 85th regiment, 27th April, 1812.

memories of those who are to decide on them. Upon the same principle, the Queen's regulations and orders for the army, issuing from the adjutant general's office, and printed by authority; and the collection of royal warrants and regulations emanating from the war office and published by order of the secretary for war, are admitted on courts martial to refresh the memory, but are not the subject of proof; it being a presumption of military law, that such orders are known to all military men, as public acts of parliament are presumed to be known to every individual of the community at large.

General
regulations
and orders,

war office
regulations.

1023. The articles of war are, by the annual mutiny act, required to be judicially taken notice of by all courts whatsoever, and copies of the same, printed by the Queen's printer, are required to be transmitted by the secretary at war to the judges of the supreme courts at home, and to the governors of Her Majesty's dominions abroad.²

Articles of
war;

1024. The gazette, purporting to be printed by the Queen's printer, is good evidence of all acts relating to the Queen or state, contained therein;³ and, by the general orders of the army, is to be received as a due notification of all promotions, exchanges or retirements.⁴

gazette.

1025. By the 8 & 9 Vict. c. 113, all copies of private and local and personal acts of parliament, not public acts, of journals of parliament, and of royal proclamations, if purporting to be printed by the Queen's printers, shall be admitted as evidence thereof, without any proof that such copies were so printed.

Acts of
parliament
not public
and acts of
state.

1026. Registers or public books, kept under the authority of particular statutes, or in public offices in the course of official duty, are admitted as evidence of such facts, required to be entered therein, as are peculiarly within the knowledge of the registering officer,—as, for instance, the register of the navy-office, with proof of the usage to return all deaths happening at sea, is evidence of the death of a sailor; the prison books of prisons are admissible to prove the dates of the commitment and discharge of prisoners, but not to prove the cause of commitment;⁵ and so, before the House of Lords,

Registers.

(2) Mut. Act. sec. 1.

(3) 2 Leach, 676.

(4) Queen's Reg. p. 65.

(5) 2 Phillips, 147, 148, and see § 1015-7.

when an officer in the army was a petitioner for a divorce, a clerk from the war office was allowed to give evidence of his absence in Canada, as proved by the monthly returns.⁶

Recent
Statutory
Provision as
to proof of
documentary
evidence.

1027. The production in evidence of many of the documents, above referred to, has been very much facilitated by recent statutes, and more especially by the following general provisions of the law of evidence amendment act:—

Examined
or certified
copies of
documents
admissible
in evidence.

1028. “Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, . . . upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.”⁷

Foreign and
colonial acts
of state,
judgments, &c.,
provable by
certified copies,

1029. The same act also provides that:—“All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony,⁸ and all affidavits, pleading, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as herein-after mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment,

(6) In March, 1852. See § 1017.

(7) 14 & 15 Vict. c. 90, s. 14.

(8) “The words ‘British colony,’ as used in this act, apply to all the British territories under the government of the *East India Company*, and

to the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, and *Man*, and to all other possessions of the *British crown* wheresoever and whatsoever.”—*Ib.* sec. 19.

decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as herein-before respectively directed the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.”⁹

without proof of seal or signature or judicial character of person signing the same.

1030. It is also provided that “If any officer authorized or required by this act to furnish any certified copies or extracts shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months.”¹

Certifying a false document a misdemeanor.

1031. Persons forging copies or certificates of records or instruments made evidence by any act of parliament are guilty of felony, and may be sentenced to penal servitude for seven years, or not less than three, or to imprisonment not exceeding two years, with or without hard labour and with or without solitary confinement.²

Forging, or tendering in evidence forged documents, a felony.

1032. The other class of writings to be spoken of, are private writings. It is a general rule of evidence that where written evidence is in its nature superior to parole or oral evidence, the writing ought to be produced, and parole evi-

PRIVATE WRITINGS; general rule as to production of written evidence.

(9) 14 & 15 Vict. c. 99, s. 7.

(1) *Ib. sec. 15.* By the 91st and 93rd articles of war, officers guilty of corresponding offences are liable on conviction before a court martial to

the peremptory punishment of cashiering, and soldiers to the penalties of disgraceful conduct. § 231.

(2) 24 & 25 Vict. c. 98, s. 28, 29.

dence of the fact is inadmissible, for the best evidence is to be produced of which the nature of the case is capable.

Originals to
be produced.

1033. So also the contents of any writing must be proved by the production of the letter, or other document, itself, unless the court be satisfied that this is impossible, otherwise the court might be put in possession of a part only and not the whole of a written paper; though it may happen that the whole, if produced, may have an effect very different from that produced by the statement of a part.

Passages
not to be
extracted.

Impropriety of
destroying
papers required
to be produced.

1034. The obvious impropriety of destroying the originals of letters or papers, after having been required to produce them in evidence, was severely animadverted upon in the general order, promulgating the general court martial on Lieutenant Hyder, of the 10th Royal Hussars: —

Displeasure
of Her Majesty
at such conduct
was signified
in a general
order.

“Her Majesty was pleased to observe, that it appeared that after the assembly, and during a short adjournment of the court, a civilian, the principal witness for the prosecution, did, in the presence, and with the acquiescence of Colonel Vandeleur, the prosecutor, destroy certain documents, which at the instance of the prisoner, such witness had been duly required to bring with him for production before the court — one of such documents being a letter having reference to the subject matter of the charge against Lieutenant Hyder, addressed on the 9th of May, 1845, by Colonel Vandeleur to the said witness; and Her Majesty was pleased to express her displeasure that Colonel Vandeleur, hastily acting, as he declares, under an impression that these documents were not in a state fit to be produced in court, and that the fair copies in his possession would be much better, should have acquiesced in a proceeding, the impropriety of which must, on reflection, be obvious to him, notwithstanding that Lieutenant Hyder, having been acquitted, has not suffered prejudice; and notwithstanding that Colonel Vandeleur had in court, and was ready to produce a paper which he alleged to be a true copy of such letter; and as to the authenticity and truth of which copy Colonel Vandeleur, who wrote the letter, the clerk who copied it, and the witness who received it, might have been examined, if Lieutenant Hyder had thought fit so to do.” *

Writings
withheld after

1035. If papers are in the possession of the opposite party,

due notice for their production should be given ; after which, if not produced, secondary evidence may be given of their contents.⁴ The prosecutor more usually gives notice to the prisoner through the judge advocate, or he may prove a parole notice to produce writings, by a third person who delivered the notice or by one who heard it delivered. The prisoner procures a summons to the prosecutor, with the *duces tecum* clause (§ 890) in the usual manner from the judge advocate or president. A written notice to produce may be proved by a duplicate original.

notice, contents may be proved.

Proof of notice to produce writings.

1036. If, in compliance with a notice, the party produces the written instrument in evidence, he is entitled to have the whole read ; and if a writing produced refer to others, with such particularity as to make it necessary to inspect them that the sense may be complete, or, referring to other writings, adopt them as part of its own meaning, he may insist on having them also read in evidence.

Party producing writings, may have the whole read and any referred to, if necessary to complete or explain the sense.

1037. Parole evidence may be given of the contents of a writing proved to be lost or destroyed, or traced to the possession of the adverse party, who refuses to produce or account for it ; or a counterpart, or duplicate, or an attested copy, will, under such circumstances, be received.⁴

Writings lost, destroyed, or withheld, attested copy admitted.

1038. It is the practice of courts martial, as referred to in the above remarks (§ 1034) on Lieutenant Hyder's case, where the impracticability of producing the original documents, or other sufficient reason is adduced (of which the court will judge), to admit copies, which must be attested in court by the person who actually made the copy, or who may subsequently have examined and compared it with the original.

Practice of courts martial sanctioned by Her Majesty's remarks.

1039. The entry of a letter by a deceased clerk, who kept the book, according to the course of business, with great punctuality, was admitted by Lord Ellenborough, as *primâ facie* evidence (which the defendant might rebut by producing the original) of the contents of a letter traced into his possession, and which, on notice, he did not produce.⁵ This may possibly apply on courts martial, when the proof of the contents of official letters or written orders may be in question.

Letter-book received in evidence.

1040. Post-marks, proved to be such, are evidence that

Post-marks evidence as to

(4) 1 Phillips, 452 ; 2 Phillips, 272-5.

(5) 2 Phillips, 294.

letters having
been in post
office.

the letters on which they are, were in the office to which these marks belong, at the dates the marks specify, but they are not conclusive evidence to that effect.⁶

Identification
of handwriting.

1041. To identify handwriting, the oath of the writer, or his admission, if produced against him, is the best evidence. The second best is the testimony of persons who saw the writing actually written; the third best is the testimony of persons who, from a knowledge of the writer, from having seen him write, and from being acquainted with his handwriting, are competent to depose to it. This proof admits of many shades. The evidence may only tend to probable presumption, or may amount to satisfactory or conclusive proof. It is not sufficient that a witness should depose to the resemblance of handwriting, but a person is competent to attest handwriting, who has seen the writer write, if only once. And a witness, though he may not have seen the person write, whose handwriting is to be proved, and with whom he has been in correspondence, may be admitted to speak of it, if he has seen letters which can be proved to have been written by him; but this antecedent proof of the identity of the person is indispensably necessary.⁷

Writing not to
be proved by
comparison.

1042. It is a rule of evidence, obtaining ever since the reversal of the attainder of Algernon Sidney, that handwriting cannot be proved by comparing the disputed writing with writings acknowledged to be genuine.⁸ But, by a very fine-drawn distinction, it is said that a witness may refer to a paper which he saw written, for the purpose of refreshing his memory, and may then give his opinion as to the handwriting in question.⁹

How far letters
are evidence of
facts related in
them.

1043. Letters or private writings, (unlike records and public documents, technically so called) are in no case evidence of the facts stated in them: but they are obviously the best proof where facts result from, or depend on, their contents, and are admitted in evidence as before observed, when in the nature of acts (§ 861), or as proof of intention, or when they are part of the subject matter of a charge, as

Contents may
be evidence
or subject of
charge.

(6) 2 Phillips, 154.

(7) 2 Phillips, 310.

(8) 2 Phillips, 309. But now by the 17 & 18 Vict. c. 125, s. 27, in civil proceedings (but not in criminal cases) comparison of a disputed wri-

ting with *any* writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses.

(9) 2 Phillips, 310.

for writing a disrespectful letter, for disobeying a written order, and so forth.

1044. Whilst on this subject, a few words may be offered with respect to the interpretation of written laws and other writings. Sir William Blackstone says: the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of them all. It will not be necessary to follow the learned commentator to the full extent. He observes, that *words* are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. That terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. When words are dubious, we may establish their meaning from the *context*; with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the preamble is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. And as to the *subject matter*, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. As to the *effects* and *consequence*, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. And lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it, or the cause which moved the legislator to enact it.¹

1045. Nor is this principle of interpretation confined to laws:—it ought to be borne in mind that the intention of all writings must be judged from all their parts, taken to-

Interpretation
of writings;

In fixing the
intention of a
law, words to be
taken according
to common
acceptation.

Words,

and technical
terms, in their
peculiar sense;

the words to be
judged by the
context, and by
comparison with
other laws,

according to
subject matter,

by their effect,

and the occasion
of an enactment.

Meaning of
writings.

(1) 1 Black. Com. 59-61.

gether, and not from any insulated or detached passage; that faults in orthography or in the grammatical construction of sentences, if the intention be apparent, cannot vitiate their design. It may also be remarked that, though collateral circumstances may be considered when endeavouring to fix the meaning of ambiguous passages, yet such circumstances must, in this case, be referred to in the writing itself.

Copies of original documents suffice to enter on, or annex to, proceedings,

the testimony by which they are substantiated being recorded.

1046. It is not necessary to annex original documents, admitted in proof, to the proceedings of courts martial, but copies of them, or, if voluminous, extracts so far as they bear on the question, and to the extent required by the parties, should be embodied in the proceedings, in the order in which they may be produced in evidence. If the handwriting of any original documents, or the truth of any copy, be *admitted* by the party against whom they may be produced, such admission must be recorded, instead of the testimony, by which they would otherwise be supported. Instead of delaying the trial to take down, and enter on the proceedings, documentary evidence as it is read, it is usual, unless where the document or extract does not exceed a few lines, to annex or append copies to the proceedings; in which last case, they must be numbered or lettered, and referred to in their proper order on the face of the proceedings; and, if not in the handwriting of the judge advocate, or copies, certified according to law, they must be compared by him, and in every case they must be identified by his signature or by that of the president, as must also all the original documents, which are annexed to the proceedings.

Annexing to proceedings, writings not evidence.

1047-9. With respect to the admission of, and the annexing to, the proceedings, writings which are not legal evidence, it may be observed that it is customary to allow a prisoner to introduce in his defence, or lay before the court, letters relative to character, which are then attached to the proceedings² since the authority which has to confirm the sentence may thereby have an opportunity of attributing to them their due importance and influence. But it must be borne in mind, that evidence as to character, to weigh

(2) When the prisoner wishes to retain the originals, he merely lays the letters or certificates before the court, and embodies copies in his address, where it is written; or, which is more

usual in every case, requests the president or the judge advocate to substitute copies verified by their signature.

with the court, must not only apply to the charge, but be strictly *legal* evidence. If a court be not authorized to admit a deposition, when made before a person empowered to administer oaths, much less can it admit any statement in writing, when not substantiated by the solemnity of an oath. It is scarcely necessary to remark, that the genuineness of letters, or other similar documents, as to character, cannot be attested on oath before a court martial, as the doing so with respect to that which is not evidence, would be to mis-apply and trifle with an oath.

The handwriting of documents, not being evidence, cannot be verified on oath.

CHAPTER XXV.

OF THE TRIAL OF CIVIL OFFENCES.

Courts martial
to dispense
criminal law,

1050. TREASON or other civil offences, which, if committed by officers or soldiers "in England, would be punishable by a court of ordinary criminal jurisdiction,"¹ are tried by a general court martial, if committed by them, when serving at Gibraltar;² or in India, at a distance of 120 miles from either of the three presidencies, (excepting Prince of Wales' Island);³ or in any other of the Queen's dominions beyond seas, where there is no competent court of civil judicature;⁴ or out of the Queen's dominions.⁵

convened as
dependent on
place;

1051. Such general courts martial are convened at Gibraltar, and in other places within the Queen's dominions (excepting India) "by the officer commanding in chief;"⁶ and in India, and out of the Queen's dominions, "by the general or other officer having power to appoint courts martial."⁷

and required to
conform to the
law of England;

1052. The articles conferring this jurisdiction, in each case, prescribe that the offender, if found guilty, shall be liable, in the case of an offence which, if committed in England, would be capital,⁸ to suffer death or such other punishment as by the sentence of such *general* court martial shall be awarded; and in the case of any other offence to suffer such

(1) This definition of the civil offences, subjected to the cognizance of general courts martial, was adopted in the articles of 1856. The articles of former years had not, in express terms, included misdemeanors, not being offences against person or property, nor other offences not amounting to felony, which nevertheless, under certain circumstances, of necessity, became cognizable by courts martial.

(2) Art. War, 145.

(3) Art. War, 146.

(4) Art. War, 145. Officers and soldiers were not in any case subjected to trial by foreign law until the year 1832. See § 77-82, 146.

(5) Art. War, 147.

(6) Art. War, 145.

(7) Art. War, 146, 147.

(8) The only crimes which, by the operation of the Criminal Statutes Consolidation Acts, continue to be punishable with death, are treason, murder, and piracy, accompanied with wounding or attempt to murder.

punishment other than death as by the sentence of such *general* court martial shall be awarded; "no such punishment, nevertheless, to be of such a nature as shall be contrary to the usages of English law in regard to the punishment of offenders." The hundred and forty-sixth article adds the words, "or of that law as modified by laws applicable to India," which were for the first time introduced in the articles of 1851. In all cases, where a court martial has convicted any officer or soldier of any offence punishable with death, the articles expressly provide that, instead of sentencing the offender to death, it may adjudge him to be kept in penal servitude for a term of not less than four years.⁹

or, in India, to that law, as there modified;

but with a power to commute death to penal servitude.

1053. The reference to *English law* in the proviso above quoted, which was inserted in the articles of 1856, will be best understood by a comparison with the articles of previous years. The corresponding provision was worded: "Such sentence nevertheless to be in conformity with the common and statute law of England." This was introduced into the articles of war only in the year 1830; but His Majesty King George the Third had previously declared the true meaning and intent of the parallel article¹ to be, that courts martial, exercising jurisdiction under it, *were bound to award such punishments only as are known to the laws of England, and that they were bound also to apply to each particular offence, the same punishment, both in kind and degree, that is applied by the common or statute law of England.*²

Legal bearing of the provision as to English law.

1054. To whatever extent the terms of the existing provision, as to the punishment of civil offences, may have been intended to modify the previous practice of courts martial, it is equally certain that every British officer, to be prepared to meet the duty which frequently awaits him on foreign service, ought to have such a general knowledge of the criminal law of England as may enable him to make the distinction between crimes, which the law has established in respect to offenders, and, by being in some measure familiarized with the subject, to have little difficulty in seeking for authorities to guide him in particular cases, or of profit-

Officers required to have some knowledge of criminal law.

(9) Art. War, 145, 146, 147. See § 38 (7). See the case of Gunner Suddis, § 77 (9).

(1) This article of war (sec. xxiv. art. 4) had been held not to require adherence to the law of England.—

(2) Circular, Horse Guards, 12th December, 1807. See also before, § 77.

Expediency of
adverting to the
criminal law.

ably using those which a judge advocate may bring to his notice. For these reasons, it has appeared advisable briefly to refer to the criminal law, and particularly to the offences which were specified in the articles of war, before the substitution of more general terms.³ Some offences against the royal prerogative (as they are commonly termed) are also noticed, as on the proclamation of martial law, the spirit, if not the letter, of the law of England would still pervade the judgment of courts martial.⁴

Liability of persons to punishment,

1055. It has been shown, (§ 586-97) when speaking of military offences, who are capable of committing crime; or rather, upon what grounds any persons are exempt from the punishment ordinarily attending the commission of certain acts. No notice has, however, been taken of the distinction between principals and accessories, as an accessory or abettor to a military crime may always be charged with a substantive offence.

unless excepted
in respect to
incapacity, or
compulsion.

Principals and
accessories.

1056. As regards civil offences, persons capable of offending, are guilty either as principals or accessories.

PRINCIPAL,
in the first
degree:
in the second
degree.

1057. The law further distinguishes between a principal in the first degree, who is the actor, or absolute perpetrator of the crime, and a principal in the second degree, who is present aiding and abetting the fact to be done. This presence need not always be an actual immediate standing by, within sight and hearing of the fact, but there may be also a constructive presence, as when one commits a robbery or murder and another keeps watch or guard at some convenient distance. And this rule hath also other exceptions; for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it, who is ignorant of its poisonous qualities, or giving it to

Constructive
presence of
principal in
second degree,

of principal in
first degree.

(3) The hundred and second article of war of 1840, and previous years, was worded, "any officer or soldier, accused of treason, murder, theft, robbery, rape, coining or clipping the coin of the realm, or any foreign coin current in the place where such officer or soldier shall be serving; or of any other capital or other felony punishable by the known laws of the land."

The modifications by the laws applicable to India are not here adverted to:—it would have been out of the writer's power to do so with anything

approaching to completeness; and there is the less occasion, as officers who are employed in the judge advocate general's department in that country have every facility for obtaining this information for the use of members of courts martial.

(4) The author's own opinion was that courts martial ought to be guided by the law of England to the exclusion of the law of the place.—See before, § 102-6. See also, as to "Followers of the army," § 74, 101.

him for that purpose, and yet not administer it himself, nor be present when the very deed of poisoning is committed. And the same reasoning will hold with regard to other murders, committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect; as by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast with intent to do mischief, or exciting a madman to commit murder, so that death thereupon ensues. In all these cases, the party offending is guilty of murder, as a principal in the first degree.⁵

1058. An accessory is he, who is not the chief actor in the offence, nor present at its performance, but is in some way concerned therein, either *before* or *after* the fact committed.⁶ In high treason there are no accessories, but all are principals; the same acts that make a man accessory in felony making him a principal in high treason. In murder and other felonies there may be accessories, except only in those offences which, by judgment of law, are sudden and unpremeditated, as manslaughter and the like, which cannot, therefore, have any accessories *before* the fact.⁷ So too in misdemeanors and in all crimes under the degree of felony, there are no accessories, either before or after the fact; but all persons concerned therein, if guilty at all, are punishable as principal offenders.⁸

1059. An accessory before the fact, is defined to be one, who, being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony. Herein, absence is necessary to make him an accessory; for if such procurer be present, he is guilty of the crime as a principal. It is also settled, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he, who in anywise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act, but is not accessory to any act distinct from the other.⁹

1060. An accessory, after the fact, is where a person,

(5) 4 Blackstone, Com. 34-35.

(6) *Id.* 35.

(7) *Id.* 36.

(8) *Id.* 36. 24 & 25 Vict. c. 94, s. 15.

(9) 3 Black. Com. 37.

Accessory after
the fact,

knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore, to make an accessory after the fact, it is, in the first place, requisite that he knew of the felony committed, (and that it was committed by the party in question).¹ In the next place, he must receive, relieve, comfort, or assist him. And generally, any assistance whatever given to a felon, to hinder his being apprehended, tried or suffering punishment, makes the assistor an accessory; as, furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him. So likewise, to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony,² (but not so, of merely suffering the felon to escape).³ To relieve a felon in (or bailed out of) prison, with clothes or other necessities, is no offence (nor is it in the physician or surgeon who attends a felon sick or wounded, although he knew him to be a felon);⁴ the crime imputable to this species of accessory being the hinderance of public justice, by *assisting* the felon to escape the vengeance of the law.⁵ The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. But, so strict is the law, where a felony is actually complete, the nearest relations are not suffered to aid or receive one another. Even if the parent assists his child, or the child the parent; if the brother receives the brother, the master his servant, or the servant his master, or, even if the husband receives his wife, who have any of them committed a felony, the receivers become accessories after the fact.⁶ But a married woman cannot become an accessory for the receipt and concealment of her husband; for she is presumed to act under his coercion, and, therefore, she is not bound, neither ought she, to discover her lord.⁶

Nearest relations
cannot aid a
felon;

except that a
wife may conceal
her husband.

Statutory provi-
sions for trial of
receivers,

1061. Although receivers of stolen goods, not being within the above definition, were not, at common law, accessories to the theft,⁷ nor, generally, triable until the person guilty of

(1) 2 Hawk. c. 29, s. 32.

(2) 4 Black. Com. 38-9.

(3) 1 Hale, 619.

(4) 1 Hale, 332.

(5) 4 Black. Com. 38.

(6) *Id.* 39.

(7) Because, it was said, they received the *goods* only, and not the *felon*.—4 Bl. Com. 38.

the principal offence had been convicted; the statute law, (§ 1201-3) has made them accessories after the fact, where the original offence was a felony, and, whether the original offence was a felony or misdemeanor, under all circumstances liable to be tried for a substantive offence, equally with accessories.

analogous to those for accessories.

1062. Legal subtleties formerly interfered to prevent the trial of accessories in a great number of cases, but now the act to consolidate and amend the statute law relating to accessories to, and abettors of, indictable offences, (24 & 25 Vict. c. 94), enacts "as to accessories before the fact (*sec. 1*): Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon." ^a (*Sec. 2*.) "Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."

ACCESSORY before the fact

may be tried and punished as principals;

and indicted as such, or as substantive felons.

1063. "As to accessories after the fact (*sec. 3*): Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished

Accessories after the fact may be indicted as such, or as substantive felons.

(8) This clause is taken from the 11 & 12 Vict. c. 36, s. 1, upon which it was held that it was no objection to an accessory before the fact being

convicted, that his principal had been acquitted, the statute having made the offence of an accessory before the fact a substantive felony.

24 & 25 Vict.
c. 94.

Punishment of
accessories after
the fact.

in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished." (Sec. 4.) "Every accessory after the fact to any felony (except where it is otherwise specially enacted), whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be liable, at the discretion of the court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour."¹

Separate acces-
sories may be
tried together,
although prin-
cipal felon not
included.

1064. "As to accessories generally, (sec. 6): Any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

Abettors in
misdemeanors.

1065. "As to abettors in misdemeanors, (sec. 8): Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

Offences herein
treated of.

1066. The more important offences will now be referred to: in the first place, treason (§ 1067), and felony in general (§ 1073); then offences of a public nature or injurious to the Queen's prerogative (§ 1075); and afterwards other offences against the person (§ 1106) and property (§ 1157) of individuals; to which is added a brief notice (§ 1225) of offences against the quarantine laws.

Treason,

1067. TREASON is defined to be an offence against the security of the Queen and her dominions. As, from the nature and definition of this crime, opportunity was afforded to create many constructive treasons, that is, to raise, by forced and arbitrary constructions, to the crime and punishment of treason, offences which never were suspected to be such, the statute of the 25th Edward III., (st. 5, c. 2) declared the offences which, for the future, should be held to be treason:—First.—*When a man doth compass or imagine the death of our lord the King, or our Lady his Queen, or their eldest son and heir.*

compassing the
death of the
King, Queen, or
eldest son and
heir.

(9) As to accessories after the fact in murder, see § 1122 (8).

(1) As to punishment of receivers of stolen goods, see § 235, 1201-3.

1068. Secondly.—*If a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir.* Violating the Queen consort.

1069. Thirdly.—*If a man do levy war against our lord the King in his realm.* Though a conspiracy to levy war will be evidence of an overt act for compassing the King's death, yet if the charge be for levying war only, it must be proved that war was actually levied, to bring the prisoner under this clause of the statute.¹ If war be levied, all the conspirators, though not in arms, are traitors. Where great numbers, by force, endeavour to remove certain persons from the King; or to deliver men out of prison, or, by intimidation and violence, to force the repeal of a law, or to reform religion; these acts will be high treason: so also, to pull down *all* brothels, *all* enclosures, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the King's authority. But where a number of persons rise to remove a grievance to their private interests, as to pull down a particular house, to lay open a particular inclosure, they are only considered as rioters.² Some of the offences, here stated to amount to treason, are in the present day preferably dealt with as felonies, and will be adverted to hereafter.³ Levying war against the King in his realm.

1070. Fourthly.—*If a man be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere.* This must likewise be proved by some overt act, as by giving them intelligence or advice; by sending them money or provisions, although intercepted; by selling them arms; by treacherously surrendering a fortress, and the like. By *enemies*, as here expressed, must be understood either the subjects of foreign powers with whom we are at open war; pirates, who may invade our coast, without any open hostilities between their nation and our own, and without any commission from any power or state at enmity with the crown of Great Britain; and our own fellow-subjects, when in actual rebellion.⁴ Being adherent to or succouring the King's enemies.

1071. By the 54 Geo. 3, c. 146, s. 1, the punishment of a man convicted of high treason is to be drawn on a hurdle Punishment for high treason.

(1) 1 Hawk. 55.

(2) 4 Black. Com. 81.

(3) See § 1076.

(4) *Id.* 83. Other offences declared

by the statute of Edward III. (§ 1067) are no longer punishable capitally, and, by the course of recent legislation, have been reduced to felonies.

to the place of execution, and be there hanged by the neck until dead, and that afterwards the head shall be severed from the body, and the body divided into four quarters and disposed of as His Majesty or his successors shall think fit; and (*sec.* 2) the Queen may, by warrant under the sign manual, direct that the offender be taken, instead of drawn, to the place of execution, and may substitute beheading whilst alive, instead of hanging.

Misprision of
treason;

1072. MISPRISION OF TREASON consists in the bare knowledge and concealment of treason, without any degree of consent thereto; for any assent makes the party a principal traitor. This concealment becomes criminal, if the party apprized of the treason do not, as soon as conveniently may be, reveal it to some judge of assize, or justice of the peace. But if there be any probable circumstances of assent, as if one go to a meeting, knowing beforehand that a treasonable conspiracy is intended, or being in such company once by accident, and having heard such treasonable conspiracy, meet the same company again, and hear more of it, but conceal it; this is an implied assent in law, and makes the concealer guilty of high treason.⁵ The punishment of misprision of treason is, loss of the profits of lands during life, forfeiture of goods, and imprisonment during life.⁶

punishment.

Definition of
felony.

1073. "FELONY" is defined by Sir William Blackstone as "an offence which occasions a total forfeiture of either lands or goods, or both, at common law; and to which capital or other punishment may be superadded, according to the degree of guilt." The term "misdemeanor," in its legal acceptation, is confined to such indictable offences, as do not amount to treason or felony.⁷

Misdemeanor, as
contradistin-
guished from
felony.

1074. Soldiers who are convicted of felony in the United Kingdom, or abroad of an offence amounting to felony, thereupon forfeit all advantage as to additional pay, good conduct pay, and pension on discharge which might otherwise have accrued from the length of their *former* service.⁸

(5) 4 Black. Com. 120.

(6) *Ib.* 121.

(7) *Ib.* 95.

(8) Art. War, 171. The definition above given (§ 1073) is not calculated to be practically useful to officers in making up the record of service of soldiers who have been convicted of

civil offences; but, as regretted by the learned gentleman who prepared the bills for the consolidation of the criminal law, "nothing can be more unsatisfactory than the distinctions between felony and misdemeanor in the present day."—*Greaves' Criminal Law Acts*, 1861, p. xlvi.

1075. The offences of a public nature, or injurious to the Queen's prerogative, which it may be advisable to notice, are: First. *Felonious compassing to levy war.* Second. *Offences relating to the coin.* Third. *The offence of serving a foreign prince or state.* Fourth. *The embezzling the Queen's stores of war.* Fifth. *Desertion from the Queen's armies in time of war.* Sixth. *Seducing soldiers or sailors from their duty and allegiance.* Seventh. *Administering unlawful oaths.* Eighth. *Illegal training and drilling.* To which may be added, *Unlawful assemblies.*

Offences injurious to the Queen's prerogative.

1076. First. *Felonious compassing to levy war.* The 11 & 12 Vict. c. 12, has been described as filling up the gap between felony and treason. It enacts (*sec. 3*) that "If any person whatsoever after the passing of this act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or councils, or in order to put any force or constraint upon, or in order to intimidate or overawe both houses or either house of parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other Her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs or successors, and such compassings, imaginations, inventions, devices or intentions, or any of them, shall express, utter, or declare by publishing any printing or writing, or by open and advised speaking,¹ or by any overt act or deed,² every person so offending shall be guilty of felony, and being convicted thereof shall be liable" (20 & 21 Vict. c. 3, s. 2) to penal servitude for life, or for not less than three years, or to im-

Felonious compassing to levy war,

punishable by penal servitude or imprisonment;

(1) Sec. 4 contains certain limitations as to prosecutions where the compassing is declared "by open and advised speaking only," and that "the words so spoken shall be proved by two credible witnesses."—See before, § 868.

(2) Sec. 5 provides that in any indictment for felony under this act, it shall be lawful to charge any number of the matters, acts, or deeds, by which such compassings, &c., shall have been expressed, uttered, or declared.

although the facts may amount to treason.	prisonment not exceeding two years, with or without hard labour. It also enacts (<i>sec. 7</i>) that if the facts or matters proved on the trial of any person amount to treason, such person shall not be entitled to be acquitted of such felony, and if tried for felony shall not be afterwards prosecuted for treason upon the same facts.
24 & 25 Vict. c. 99 Coinage offences.	1077. Second.—As to <i>offences relating to the coin</i> , it will be enough to refer to the more common offences dealt with under the 24 & 25 Vict. c. 99, consolidating and amending the statute law against offences relating to the coin. By <i>sec. 2</i> , whosoever counterfeits the gold or silver coin; ³ or <i>sec. 3</i> , colours counterfeit coin or any pieces of metal with intent to make them pass for gold or silver coin; or colours or alters genuine coin with intent to make it pass for a higher coin, shall be guilty of felony and liable to penal servitude for life or not less than three years, or to imprisonment for two years with or without hard labour and solitary confinement.
Counterfeiting gold or silver.	1078. By <i>sec. 4</i> , persons impairing, diminishing or lightening the gold or silver coin with intent that it may pass current, are guilty of felony, and liable to penal servitude not exceeding fourteen or less than three years, and to imprisonment as above (§ 1077).
Colouring silver or copper coin;	1079. By <i>sec. 9</i> , "Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit," shall be guilty of a misdemeanor, and liable to be imprisoned for one year with or without hard labour, and solitary confinement.
felony.	1080. By <i>sec. 12</i> , persons convicted of a second offence of uttering, &c., after a previous conviction for the same, or after a conviction of felony relating to the coin, are guilty of felony and liable to penal servitude for life.
Punishment.	1081. By <i>sec. 13</i> , persons uttering foreign coins, or medals,
Impairing gold or silver coin;	<p>(3) Under the interpretation clauses of this act, the expression "the Queen's current gold or silver coin" includes "any gold or silver coin coined in any of Her Majesty's mints, or lawfully current, <i>by virtue of any proclamation or otherwise</i>, in any part of Her Majesty's dominions, whether within the United Kingdom or other- wise." The expression "the Queen's copper coin" in like manner includes any copper coin and any coin of bronze or mixed metal. The words in <i>italic</i> were inserted on the passing of the present act in 1861, and include all foreign and other coins legally current in the colonies.</p>
felony.	
Punishment.	
Uttering counterfeit gold or silver coin,	
misdemeanor.	
A second offence,	
felony.	
Uttering foreign coin with intent to defraud.	

as current coin, "being of less value than" such current coin, are guilty of misdemeanor, and liable to imprisonment not exceeding one year, as above (§ 1079).

1082. By *sec. 14*, counterfeiting the copper coin is a felony punishable by not more than seven years' penal servitude or imprisonment as above (§ 1077). Counterfeiting copper coin, a felony. 24 & 25 Vict. c. 99.

1083. By *sec. 15*, uttering base copper coin is a misdemeanor punishable by not more than one year's imprisonment, which, as in the above cases (§ 1077-82), may be with or without hard labour and solitary confinement. Uttering base copper coin, a misdemeanor.

1084. Defacing the current coin, gold, silver, or copper, by stamping names or words thereon, is a misdemeanor, punishable by imprisonment not exceeding one year with or without hard labour, but the act is in this case silent as to solitary confinement. Stamping names on coin, a misdemeanor, punishable by imprisonment, not solitary.

1085. *Sec. 29* enacts that it is not necessary to produce a moneyer or other officer of the mint, but that it may be proved by any other credible witness; and *sec. 1* declares that any current coin which shall be gilt, silvered, coloured, washed, or cased over, or in any manner altered so as to resemble a higher denomination, shall be deemed to be "counterfeit coin;" and farther, that having in possession shall extend to "knowing and wilfully" having it in the custody or possession of any other person, and to the having, under any circumstances, whether for the benefit of the offender or that of any other person. What shall be sufficient proof of the coin being counterfeit. Rules of interpretation, as to "counterfeit," "possession."

1086. Third.—*Serving a foreign prince or state.* Entering into the service of any foreign state without the Queen's consent, or contracting with it any engagement which subjects the party to an influence or control, inconsistent with the allegiance due to the sovereign, is at common law a high misdemeanor and punishable accordingly.⁴ Disobedience to the Queen's letter to a subject, commanding him to return from beyond the seas; or to the Queen's writ of *ne exeat regno*, commanding a subject to stay at home, is a high misprision and contempt. And it is considered so high an offence to prefer the interest of a foreign state to that of our own, that any act is criminal which may but incline a man to do so; as to receive a pension from a foreign prince Serving a foreign state; Disobeying the Queen's letter of recall.

Entering a
foreign service
without Her
Majesty's leave;

procuring others
to enlist.

Punishment.

Embezzling
stores of war.

Desertion,

without the leave of the Queen.⁵ And with respect to serving or procuring others to serve foreign states, the 59 Geo. 3, c. 69, enacts that if any natural born subject of His Majesty shall take or accept any commission, or shall otherwise enter into the naval or military service of any foreign prince, state, potentate or colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the power of government in or over any foreign country, colony, province, or part of any province or people, without the license of His Majesty under the sign manual, or signified by order in council or by royal proclamation; or if any person whatever, within the dominions of Great Britain, shall hire, or attempt or endeavour to hire, retain, engage or procure any person or persons to enlist in the service of any power or powers, &c., as aforesaid; every person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine and imprisonment at the discretion of the court.

1087. Fourth. — *Embezzling the Queen's stores of war.* The 4 Geo. 4, c. 53, enacts, that every person who shall be lawfully convicted of stealing or embezzling His Majesty's ammunition, sails, cordage, or naval or military stores, or of procuring, counselling, aiding, or abetting any such offender, shall be liable (20 & 21 Vict. c. 3, s. 2) to penal servitude for life, or for not less than three years; or to be imprisoned with or without hard labour for any term not exceeding seven years. It is to be observed, that persons, subject to the mutiny act, can be punished for embezzlement by sentence of a court martial only as directed by the mutiny act (§ 200), though the trial be held abroad, where there be no form of civil judicature in force.⁶

1088. Fifth. — *Desertion from the Queen's armies in time of war.* The provisions of the mutiny act render it quite unnecessary to notice in this place *desertion* as a felony injurious to the prerogative. It may however be remarked, that

(5) 1 Hawk. 91.—It is declared in the regulations respecting foreign orders, "That no British subjects shall accept a foreign order, or wear its insignia, without having previously obtained a warrant under the royal

sign manual, (directed to the earl marshal of England,) granting them Her Majesty's permission to accept and wear the same."

(6) Letter of the commander-in-chief, 12th December, 1807.

soldiers deserting from the King's armies were punishable as felons by the 18 Hen. 6, c. 19, and subsequent acts.

1089. Sixth. — *Seducing soldiers or sailors from their duty and allegiance.* The 37 Geo. 3, c. 70, a similar act having been passed in the parliament of Ireland of the same date, both made perpetual by the 57 Geo. 3, c. 7, enacts, that any person who shall maliciously and advisedly endeavour to seduce any person serving in His Majesty's service, by sea or land, from his duty and allegiance; or to incite any person to commit any act of mutiny or mutinous practice, shall be guilty of felony, and (7 Will. 4 & 1 Vict. c. 91, s. 1, and 20 & 21 Vict. c. 3) liable to penal servitude for life or not less than three years, or imprisonment for not more than three years, with or without hard labour, and with or without solitary confinement.

Seduction of
soldiers or
sailors,

felony.

1090. Seventh. — *Administering unlawful oaths.* The 37 Geo. 3, c. 123, enacts, that whoever shall administer, or cause to be administered, or shall be present at, and consenting to the administering of, or shall take any oath or engagement intended to bind any person in any mutinous or seditious purpose, or to belong to any seditious society or confederacy, or to obey any committee or any person not having legal authority for that purpose, or not to give evidence against any confederate or other person, or not to discover any unlawful combinations, or any illegal act, or any illegal oath or engagement, shall be guilty of felony, and liable (20 & 21 Vict. c. 3) to penal servitude for seven years, or not less than three years. Compulsion shall be no excuse, unless the person, within four days after he has an opportunity, disclose the whole of the case to a justice of the peace; or, if a seaman or soldier, to his commanding officer. A person acquitted under either of the two last-mentioned statutes, shall not be prosecuted again for the same fact for high treason; but these statutes shall not prevent any person not already tried under them from being prosecuted for high treason, in the same manner as if they had not been passed.

Administering
unlawful oaths.

1091. By the 52 Geo. 3, c. 104, (to render the foregoing statute more effectual,) it is enacted, that every person who shall in any manner or form, administer or cause to be administered, or be aiding or assisting at the administering of any

Oaths to commit
treason or
felony.

oath or engagement, purporting or intending to bind any person taking the same to commit any treason or murder, or any felony punishable by law with death, shall, on conviction, be adjudged guilty of felony, and (7 *Will.* 4 & 1 *Vict.* c. 91) be liable⁷ to penal servitude for seven years, and not less than three years, or to be imprisoned for not more than two years; and every person *taking* such oath, not being compelled thereto, shall be kept in penal servitude for life, or for such term of years as the court before which the offender be tried, shall adjudge.⁷

Military
training,

a misdemeanor.

1092. Eighth.—*Illegal training and drilling.* The 60 Geo. 3, & 1 Geo. 4. c. 1 (*sec.* 1,) prohibits all meetings and assemblies, for the purpose of military training, without authority from His Majesty, or the lieutenant, or two justices of the peace: and every person present at such meeting, for the purpose of training or drilling others, shall on conviction be liable (20 & 21 *Vict.* c. 3) to penal servitude for seven, or not less than three years, or imprisonment for two years. Persons attending for the purpose of being trained, or who shall be trained or drilled to the use of arms, or to the practice of military exercise, movements or evolutions, being legally convicted, shall be liable to fine and imprisonment not exceeding two years. By *sec.* 2, any justice or peace officer, or any other person acting in their aid, may disperse such unlawful meeting; and arrest and act over any person present thereat; and by *sec.* 3, prosecutions are limited to six months.

Riots, &c.

1093. Lastly.—*Unlawful assemblies and riots.* It may be desirable to give the legal definition of these terms,⁸ and to preface a brief statement of the law on these points, by the opinions of some able lawyers, who at different periods have clearly expressed themselves as to the power and duty of military men and private persons, to interfere for the suppression of riots and riotous assemblies.

Unlawful
assembly;

1094. *An unlawful assembly* is when three or more do assemble themselves together (though they afterwards depart of their own accord, without doing anything), with an *intent* mutually to assist one another against any who shall oppose

(7) 9 & 10 *Vict.* c. 24, s. 1, and 20 and 21 *Vict.* c. 3.

constituting an unlawful assembly. do make some advances towards the execution of the intended enterprise.

(8) A *riot* is where three or more,

them, in the execution of some enterprise of a *private* nature, with force of violence, against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful: to constitute a riot, there must be, ^{a riot.} not only the unlawful assembly of three or more, but some act of violence, or at least such an apparent tendency thereto as may be naturally apt to strike terror into the people, as the show of arms, threatening speeches, or turbulent gestures.⁹

1095. But a riot is not less a riot, nor an illegal meeting less an illegal meeting, because the proclamation required by the riot act has not been read; — the effect of that proclamation being to make the parties guilty of a felony if they do not disperse within the hour; and if it be not read, or in cases where provisions of the statute are not applicable, the common law offence remains, and it is a misdemeanor.¹

Illegal meetings and riots are not constituted by the riot act.

1096. The following opinion was given by the first Lord Ellenborough, in 1801, being then attorney general, and is inserted in the Queen's Regulations (*p.* 201) for the information and guidance of officers proceeding to suppress riots and disturbances: "In case of any sudden riot or disturbance" (the latter word being assumed to import a breach of the peace by an assembled multitude,) "*any* of His Majesty's subjects, without the presence of a peace officer of any description, *may arm themselves* and of course may use *ordinary means of force*, to suppress such riot and disturbance. This was laid down in my lord chief justice Popham's reports, 121, and Keeling, 76, as having been resolved by all the judges, in the 39th of Queen Elizabeth, to be good law, and has certainly been recognized by Hawkins and other writers on the crown law, and by various judges at different periods since. And what His Majesty's subjects *may* do, they also *ought* to do for the suppression of public tumult, when an exigency require that such means be resorted to. Whatever *any other class* of His Majesty's subjects may allowably do in this particular, the *military may unquestionably do also*. By the common law, every description of peace officer may, and ought to do, not only all that in him lies towards the suppression of riots, but may, and ought to command *all other persons* to assist

Opinion of Lord Ellenborough.

Duty of soldiers to suppress riots, and tumultuous assemblies.

(9) 1 Hawk. 295.

(1) *R. v. Furzey*, 6 C. & P. 81, see § 1105.

therein. However it is by all means advisable to procure a justice of the peace to attend, and *for the military to act under his immediate orders*, when such attendance and the sanction of such orders can be obtained, as it not only prevents any disposition to unnecessary violence on the part of those who act in repelling the tumult, but it induces also, from the known authority of such magistrates, a more ready submission on the part of the rioters, to the measures used for that purpose; but still, in cases of *great and sudden emergency*, the *military, as well as all other individuals, may act without their presence*, or without any other peace officer whatever."

Opinion of Sir
James Mansfield.

1097. Sir James Mansfield, chief justice of the common pleas, is reported to have delivered himself in these terms: "Since much has been said about soldiers, I will correct a strange mistaken notion which has got abroad, that because men are soldiers, they cease to be citizens: a soldier is gifted with all the rights of other citizens, and he is as much bound to prevent a breach of the peace or a felony, as any other citizen. In 1780 this mistake extended to an alarming degree: soldiers, with arms in their hands, stood by and saw felonies committed, houses burnt and pulled down before their eyes, by persons whom they might lawfully have put to death, if they could not otherwise prevent them, without interfering; some because they had no commanding officer to give them the command, and some because there was no justice of the peace with them.² It is the more extraordinary, because formerly the *posse comitatus*, which was the strength to prevent felonies, must, in a great proportion, have consisted of military tenants, who held lands by the tenure of military service. If it is necessary for the purpose of preventing mischief, or for the execution of the laws, it is not only the right of soldiers, but it is their duty to exert themselves in the assisting the execution of a legal process, or to prevent any crime or mischief being committed. It is, therefore, highly important that the mistake should be corrected, which

(2) On this occasion, the following general order was issued to all His Majesty's forces in Great Britain, and was publicly notified by a proclamation of the same date:—

"G. O. Adj-Gen. Office, June 7, 1780.
"In obedience to an order of the

King in council, the military are to act without waiting for directions from the civil magistrate, and to use force for dispersing the illegal and tumultuous assemblies of the people."

"WM. AMHERST, A. G."

supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights or duties of an Englishman."³

1098. The lord chief justice (Tindal), in the course of his charge, to the grand jury on the special commission at Bristol in 1831, expressed himself in these terms: "In the first place, by the common law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse or assist in dispersing those who are assembled: he may stay those who are engaged in it from executing their purpose: he may stop and prevent others, whom he shall see coming up, from joining the rest, and not only has he the authority, but it is his bounden duty as a good subject of the King to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against evil doers to keep the peace. Such was the opinion of all the judges in the time of Queen Elizabeth, in a case called 'the case of arms,' (Popham's Reports, 121,) although the judges add, 'that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King, in doing this.' It would undoubtedly be more advisable so to do, for the presence and authority of the magistrate would restrain the proceeding to such extremities, until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events the assistance given by men who act in subordination to, and concert with, the civil magistrate will be more effectual to attain the object proposed, than any efforts, however well intended, of separate and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself, and upon his own responsibility, in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object, will be supported and justified by the common law; and whilst I

Opinion of Lord
Chief Justice
Tindal.

am stating the obligation imposed by the law on every subject of the realm, I wish to observe that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority, to preserve the peace of the King, as any other subject. If the one is bound to attend the call of the civil magistrates, so also is the other; if the one may interfere for that purpose, when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to, and in aid of, the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force. But where the danger is pressing and immediate,—where the felony has actually been committed or cannot otherwise be prevented, and, from the circumstances of the case, no opportunity is offered of obtaining a requisition from the proper authorities, the military subjects of the King, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people.”

Opinion of Mr.
Justice
Littledale.

1099. On the trial of the Mayor of Bristol in the Court of King's Bench, on an information filed by the attorney general, charging the mayor with neglect of duty during the riots, above referred to, Mr. Justice Littledale, in his charge to the jury, observed: “Then, gentlemen, another charge upon the mayor is, that upon being required to ride along with Major Beckwith, he did not do so. Gentlemen, in my opinion, he was not bound to do so in point of law. I do not apprehend that a justice of the peace is bound to ride along and charge with the military: I think he was not bound to do so; a military officer may act without authority of the magistrate, if he chooses to take the responsibility; but though that is the strict law, there are few military men who will take upon themselves to act without a magistrate, except on the most pressing occasion, where it is likely to be attended with a great deal of destruction of life;—a man,

generally speaking, does not like to do it without the authority of a magistrate, though the authority need not be given by his presence. The mayor did give his authority to act,—the order has been given in evidence,—he requested Colonel Brereton to do what was necessary to preserve the peace. I should say, in point of law, a magistrate is not bound to ride with the soldiers, and more particularly on this occasion, where the presence of the mayor might be required to give general direction. If he made one charge, he must make as many other charges as the soldiers make. It is not in evidence that the mayor was able to ride: there is a surmise that he had been seen on horseback; but he was not a gentleman in the habit of riding. I am not certain whether some one person did not see him on horseback, but it is not only necessary to ride, if you make a charge, but you must ride as soldiers do; if you do not ride in a military manner, the probability is you would soon be unhorsed, and do more harm than good; and more than that, if a man was to appear in a plain dress, heading the military, if the mob were disposed to resist, the mob would select him out to destroy him; and I do not apprehend it is any part of the duty of a person who gives general directions, to expose himself to all kinds of personal danger. It is the case with generals in the army; they do not consider it necessary to expose themselves to personal danger; if his troops are defeated, a general officer may think it necessary for him to lead them on; he may go and lead them, as being the first man; but in the general conduct of military manœuvres, it is not the practice for a general officer to expose himself in the front of the charge. I can see no reason why a magistrate should do it. I can conceive of a case where it might be prudent for a magistrate to do it,—where there was any likelihood of the military not succeeding for want of a magistrate; but upon this occasion it was not necessary.”¹

1100. From these several opinions it may be seen that it is required, by the laws of the land, of soldiers as of other, the Queen's subjects, to assist, in the suppression of riots, and that they may interfere without any warrant or sanction

Soldiers, as
other citizens,
may suppress
riots.

(1) Published Report of the trial, hand report of Mr. Gurney, pp. 419, accurately transcribed from the short- 420.

of the civil magistrate, for the prevention, and lawfully put to death persons in the actual commission, of felony, as the burning or destruction of houses, stacks, or shipping, if not able otherwise to restrain them. But as Mr. Justice Littledale remarked, "there are few military men who will take upon themselves to act, except on the most pressing occasions;"—"it would be more discreet to be assistant to the justices;" and in the same view, the Queen's Regulations² point out that "no officer is to go out with troops in the suppression of riot, the maintenance of the public peace, and the execution of the law, excepting upon the requisition of a magistrate, in writing;" and further: "That the magistrate is to accompany the troops, and the officer is to remain near him:" "that the officer is not to give the word of command *to fire* unless distinctly required to do so by the magistrate:" "that the firing is to cease the instant it is no longer necessary, whether the magistrate may order the cessation or not." These instructions obviously contemplate, that the magistrate, as well as the officer, will perform his duty zealously; but should such a case arise as that which happened at Bristol, where the safety of a city and the lives of thousands were endangered, the town being fired in several places, and the public prisons forced or destroyed, and the prisoners set at large, there can be no doubt, that the officer in command of the troops, would not only be justified, but required to take upon him the responsibility which the magistrate may, by not accompanying the troops, decline; and which, as appears by Mr. Justice Littledale's charge, he may do or not in his discretion.³

(2) Confidential instructions, dated 27th March, 1835; now embodied in the Queen's Regulations, p. 203-4.

(3) It is laid down in the general orders for the guidance of the troops in Ireland, that they may act without a magistrate "in cases where in the immediate presence of the military, resistance is opposed to the police, or an attack is made upon them in the execution of their duty under circumstances not admitting sufficient time for procuring a regular requisition from the nearest magistrate for their support, but whose attendance must nevertheless be summoned as speedily as possible; or in cases where self-defence renders it necessary for them to have

recourse to arms, or where under their own immediate notice attacks are made on persons or property, in which latter cases it will be their duty, as far as they possibly can, to afford protection, taking particular care, however, to use their arms only in the last extremity."

The following extracts from a communication made by the secretary of state for the home department, which were circulated in the northern district some years since by the major-general who then held the command, are to the same effect; pointing out that the military may legally act—

1st.—"For their own defence, and then the necessity must, of course,

What this learned judge remarked in his charge when referring to the situation of a magistrate or peace officer, entrusted with the duty of suppressing a riot, is more particularly applicable to the case of an officer in command of troops, employed on such duty: "on the one hand, if he exceeds his power and occasions death, or the destruction of property or other violence or injury, he is liable to be proceeded against by indictment for murder or manslaughter, or as the case may happen to be. On the other hand, if he neglect his duty and does not do enough, he is liable to be proceeded against, as charged in this information, for a criminal neglect of duty. You will take into consideration the circumstances in which a man is placed,—he is bound to hit the exact line between an excess and doing what is sufficient,—there is only one precise line, and how difficult it is, in cases of riots of this kind, to hit that line:—that will be taken into account in considering this case. Still, however, in point of law he is bound to do it; and though you will give a very lenient consideration to it, it is for you to consider whether he has hit that precise line or not."⁴

1101. By the definition before quoted (§ 1094), three persons are essential to a riot; therefore, if the evidence fail as to all but two they are necessarily freed. Women are punishable as rioters, but not infants under the age of discretion.⁵ The intended *enterprise* must be of a *private*, and not of a public nature; if *public*, as to redress public grievance, it amounts to high treason, but, as before observed, may be charged as felony only. One of the rioters at Bristol indicted for felony, in attacking the public prisons, pleaded that the offence was treason, not felony, as he had openly declared that he would destroy *all* the prisons in the kingdom. The judge overruled the objection, admitting that the offence was treasonable, but asserting that still it might also be

Further remarks
as to riots.

be decided by their own officer."⁶

2nd.—"In aid of the civil power, in which case they must be accompanied by a magistrate."

3rd.—"In the aid of the owner of property, attacked by a riotous mob, in which case the owner may delegate

to the soldier the exercise of the right of defence which belongs to himself, and which he may equally delegate to any friend or servants."

(4) Printed report of the trial, pp. 397–398.

(5) 1 Hawk. 299.

* It must be remembered, that the officer, in these cases, acts at his own peril, and that he may be called on to justify himself before the civil tribunal.

felony, and prosecuted as such under the act introduced by Sir Robert Peel.⁶

Power of
Justices.

1102. The 13 Hen. 4, c. 7, empowers and requires justices of the peace, to the number of two or more, and the sheriff or under-sheriff, to proceed, with the power of the country, to suppress any riot, assembly, or rout of people, and arrest the offenders; and the 2 Hen. 5, c. 8, declares, that the King's liege people, being sufficient to travel (interpreted to except only women, clergymen, persons decrepit, and infants under the age of fifteen,)⁷ shall, on pain of fine and imprisonment, be assistant to them, to resist such riots, routs, and assemblies.

Riot, a mis-
demeanor,
punishable by
fine and
imprisonment,
or both.

1103. The punishment for a riot at common law is fine or imprisonment, or both; and by the 3 Geo. 4, c. 114, such imprisonment may, if the court think fit, be with hard labour.

Riot act renders
an unlawful
assembly felo-
nious, in the cir-
cumstances
therein set forth.

1104. If the persons tumultuously assembled are above the number of twelve, even although a riot may not have been as yet committed,⁸ the 1 Geo. 1, st. 2, c. 5, commonly called *the riot act*, becomes applicable; this statute is generally had recourse to by magistrates in suppressing riotous assemblies, but, as before shown, it is still competent to them, by the common law, to suppress such assemblies without resorting to it; and in extreme cases, not admitting delay, it is obviously their duty to do so. By the first section, if any *twelve* persons or more are unlawfully, riotously and tumultuously assembled, *to the disturbance of the public peace*, and any one justice of the peace, or the sheriff of the county or his under-sheriff, or the mayor, bailiff, or other head officer of any city or town corporate, shall require or command them, by proclamation in the Queen's name, to disperse; and if, to the number of twelve or more, notwithstanding such proclamation made, they continue together for an hour afterwards, such continuing together shall be felony. The second section enacts, "That the order and form of the proclamation that shall be made by the authority of this act shall be as hereafter followeth; (that is to say) the justice of the peace, or other persons authorized by this act to make

(6) See before, § 1069, 1076.

(7) 1 Hawk. 301.

(8) R. v. James. 5 C. & P. 153.

the said proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be, while proclamation is making, and after that, shall openly, and with a loud voice, make or cause to be made, proclamation of these words, or like in effect." *'Our sovereign lady the Queen chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George the First, for preventing tumults and riotous assemblies. God save the Queen.'*⁹ The third section requires every justice of the peace, and all peace officers are required to seize, and are authorized to call on all Her Majesty's subjects of age and ability to assist in seizing such persons as unlawfully continue assembled one hour after the proclamation is made, in order to their being carried before one or more justices of the peace, to the end that they may be proceeded against according to law; and if they make resistance, and happen to be killed, maimed, or hurt, then every justice of the peace, peace officer, and all and singular persons being aiding and assisting to them, are indemnified, as well against the Queen's majesty as against all and every other person of, for, or concerning such killing, maiming, or hurting. If the reading of the proclamation be by force opposed, or the person making or going to make proclamation be in any manner wilfully hurt or hindered from the reading of it, the persons opposing, hindering, or hurting; and also all persons to whom such proclamation ought to have been made, continuing together for one hour after such let or hinderance, and knowing of such hinderance, are declared felons. The 7 Will. 4 & 1 Vict. c. 91, and the 9 & 10 Vict. c. 24, s. 1, for the punishment of death provided by this act, substituted (20 & 21 Vict. c. 3,) penal servitude for life, or not less than three years, or imprisonment not exceeding three years, with or without hard labour and with or without solitary confinement. Prosecutions, under the act, are limited to twelve months; and damage done by rioters is to be made good by the

Form of proclamation, commonly called "reading the riot act."

Justices may call upon all persons to assist,

and such persons are indemnified in the event of any loss of life.

Resisting reading of proclamation.

Punishment of felonies under the riot act.

Limitation of prosecutions.

(9) The corresponding Irish act was King George the Third.
'made in the twenty-seventh year of

inhabitants, and to be recovered by the procedure therein directed.

Remarks by
Lord Lough-
borough on
the riot act.

1105. Lord Loughborough, then chief justice of the common pleas, in his charge to the grand jury on the special commission in consequence of the riots of 1780, which have been already referred to, made the following remarks, which very clearly point out the legal effect of the riot act:—"I take this public opportunity of mentioning a fatal mistake into which many persons have fallen. It has been imagined, that because the law allows an hour for the dispersion of a mob, when the riot act has been read by the magistrate, the better to support the civil authority, that during that time the civil power and the magistracy are disarmed, and the King's subjects, whose duty it is at all times to suppress riots, are to remain quiet and passive.—No such meaning was within view of the legislature, nor does the operation of the act warrant such effect. The civil magistrates are left in possession of all those powers which the law had given them before. If the mob collectively, or a part of it, or any individual, within or before the expiration of that hour, attempts, or begins to perpetrate an outrage amounting to felony,¹ to pull down a house, or by any other act to violate the law, it is the duty of all present, of whatever description they may be, to endeavour to stop the mischief, and to apprehend the offender."²

HOMICIDE
of three kinds:

felonious and
punishable;

justifiable,
or excusable,
and in neither
case incurring
any penalty.

Justifiable
homicide:
when in
advancement
of public
justice.

1106. Offences against the persons and property of individuals are next to be considered, and of these the crime of feloniously killing a fellow-creature is naturally the most important. But before adverting to *felonious* homicide it may be advisable to mention those cases in which the taking of human life is free from legal guilt, the circumstances being such as render it either *justifiable*, or, at least, *excusable*.³

1107. JUSTIFIABLE HOMICIDE may arise from *necessity* imposed by law;⁴ when the proper officer executes a criminal in strict conformity with his sentence;⁵ or if a person having actually committed a felony, will not suffer himself to be ar-

(1) See as to riotously and tumultuously destroying property, § 1217-1218.

(2) 21 Howell's *St. Tr.* 485.

(3) By the 24 & 25 Vict. c. 100, s. 7 (§ 1111), there is no penalty on a finding of excusable homicide, and

consequently there is no practical distinction between justifiable and excusable homicide.

(4) 4 Black. Com. 178-180.

(5) 1 Hawk. 105. 1 Black. Com. 178.

rested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those persons who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. So, if an innocent person be indicted for a felony, and will not suffer himself to be arrested by *the officer*, who has a *warrant* for that purpose, he may lawfully be killed by him, if he cannot otherwise be taken; for there is a charge against him, on record, to which, at his peril, he is bound to answer. If a prisoner endeavouring to break gaol assault his gaoler, or going to a gaol resist the officer, he may be lawfully killed by him in the affray.¹ In civil causes, though the sheriff cannot kill a man who flies from the execution of a civil process,² yet, if he resist the arrest, the sheriff or his officer is not bound to give back, but may stand his ground and attack the party;³ and, if in the affray he unavoidably kills him, he is justified.⁴ In case of a riot, or seditious assembly, the officers and persons assisting to disperse the rioters, are justified in killing them, both at common law,⁵ and by statute.⁶ In all these cases there must be an apparent necessity on the officer's side;—that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide were committed; otherwise, without such absolute necessity, it is not justifiable.⁷

§ 1108. Homicide, when committed for the *prevention* of any forcible and atrocious crime, is justifiable by the law of nature as well as by the law of England; as if a person attempt the robbery or murder of another, or attempt to break open a house *in the night time* (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted⁸ and discharged: and this extends not

a person
suspected of
felony,
resisting
arrest;

breaking gaol;

resisting a civil
process;

rioters;

but if no reason-
able neces-
sity for the
violence used,
the killing
may be murder,
and at
the least
manslaughter.

For prevention
of felony:

killing robbers
and burglars:

(1) 1 Hawk. 106. No private person, of his own authority, can arrest a man for any other matter as he may for felony.—*Id.* 108.

(2) 1 Hawk. 108.

(3) *Id.* 107.

(4) *Ib.*

(5) *Id.* 108.

(6) 1 Geo. 1, st. 2, c. 5; before § 1104.

(7) 4 Black. Com. 180.

(8) In the case of forcible misde-

meanors, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet if he kill him it will be manslaughter;—or, if instead of beating him, he attack him with a deadly weapon, it would perhaps be murder, particularly if the wound were given after the party had desisted from his trespass.—Archbold, 547.

killing
ravishers.

only to members of the same family, but also to strangers who may be accidentally present.⁹ A woman is justified in killing one who attempts to ravish her; and so too, the husband or father may justify killing a man who attempts a rape upon his wife or daughter; but not if he take them in adultery by consent, for the one is forcible and felonious, the other not. This reaches not to any misdemeanor nor to felonies unaccompanied with force, as picking of pockets, or the breaking open a house in the day time, unless it carry with it an attempt of robbery, murder, or the like, and even in cases within the rule, it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon, otherwise the homicide will be manslaughter at least, if not murder.¹ In these instances of *justifiable homicide*, the slayer, in the eye of the law, is in no kind of fault whatever, and is, therefore, to be totally acquitted and discharged with commendation, rather than blame.²

Homicide
excusable.

by misad-
venture;

killing by
accident;

killing by
correction.

1109. EXCUSABLE HOMICIDE is either by misadventure, or in self-defence upon a sudden affray. Homicide by *misadventure* is, where a man doing a *lawful* act without intent to hurt another, and death casually ensues; as where a man is at work with a hatchet, and the head flies off and kills one who stands by; or where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man; or where a third person whips a horse on which a man is riding, whereupon he springs out and runs over a child and kills him; in which case it is homicide, by misadventure in the rider, and he who gave the blow is guilty of manslaughter.³ But if a person riding in the street whip his horse, and put him into speed, and run over a child and kill him, it is homicide, and not by misadventure; and if he ride so in a press of people, with intent to do hurt, and the horse killeth a person, it is murder in the rider.⁴ When a parent is moderately correcting his child; a master his apprentice or scholar; or an officer is punishing

(9) 1 Hale, 481, 484. Fost. 274.

(1) In cases within the rule, the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence (§ 1110), but may even pursue the assailant

until he finds himself or his property out of danger.—Fost. 273, cited Arch. 547.

(2) 4 Black. Com. 182.

(3) 1 Hawk. 111.

(4) 1 Hale, 476. Compare § 1138.

a criminal, and happen to occasion death, it is only misadventure: yet if such persons, in their correction, exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensue, it is manslaughter at the least, and in some cases (according to circumstances) murder.⁵ It will thus be seen, that homicide by misadventure is only when death ensues upon a man's doing a lawful act; for if the act be done in prosecution of a felonious intention, it will be murder.⁶ It seems that in homicide, the guilt depends upon one or other of these circumstances, either that the act might probably breed danger, or that it was done with a mischievous intent.⁷ The rule, excepting homicide as excusable, supposeth that the act from which death ensued, was *malum in se*, innately wrong, such as a man's conscience ought to lead him to avoid; for if it were barely *malum prohibitum*, declared illegal by legislators, and not wrong intrinsically, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man.⁸ If a person shoot at another's poultry, with a design to *steal* them, and accidentally kill a man, it is murder, because the intent is felonious;⁹ but without this intent, it is manslaughter, for the act of shooting is unlawful but not felonious.¹ And, in general, if death ensue in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing; in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts;² and if death accidentally ensue in the execution of an unlawful act amounting to *felony*, it is murder.³ Such manly sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, are not deemed unlawful; but prize fighting

Further definition of homicide by misadventure.

(5) 1 Hawk. 111. 1 Leach, 410.—The point, on which the conviction of Governor Wall (who suffered death for the murder of Benjamin Armstrong, a gunner of the artillery, at Goree,) chiefly rested, was his having inflicted the sentence of a drum-head court martial with a rope one inch in diameter, instead of the usual cat-o-

nine-tails.—28 Howell's *State Trials*, 155.

(6) 1 Hawk. 113.

(7) 1 Russ. 856.

(8) Foster, 259.

(9) 1 Hawk. 126.

(1) 1 Hawk. 112.

(2) 4 Black. Com. 182.

(3) 1 Hawk. 126.

public boxing matches, or any other sports of a similar kind which are exhibited for lucre, and tend to encourage idleness, by drawing together a number of disorderly people, have met with a different consideration.⁴

Homicide on
sudden affray.

1110. Homicide upon a sudden fray, is, by the English law, matter of excuse, rather than of justification. It must be distinguished from that species of self-defence, just now mentioned (§ 1108), which is calculated to hinder the perpetration of an atrocious crime, and where the slayer is free from all blame. It is when a man protects himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. The right of natural defence does not imply a right of attacking; for instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot, therefore, legally exercise this right of preventive defence, but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant. It is frequently difficult to distinguish homicide in self-defence upon sudden affray, from manslaughter, in the legal acceptance of the word. But the true criterion between them seems to be this: when both parties are actually combatting at the time when the mortal stroke is given, or the slayer was not in immediate danger of death, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or (having begun, and that not from malice prepense) declines or endeavours to decline any further struggle, and afterwards being closely pressed by his antagonist, kills him to avoid his own destruction; this is homicide excusable by self-defence. Under this excuse of self-defence, the principal civil and natural relations are comprehended, therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the person assisting being construed the same as the act of the party himself.⁵

No punishment

1111. The 24 & 25 Vict. c. 100, s. 7, declares that "no

(4) 1 East. 270.

(5) 4 Black. Com. 186.

punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony.”

now attaches to homicide by misfortune or in self-defence.

1112. Felonious homicide is the killing a human creature,⁶ of any age or sex, without justification or excuse; which is again divided into *manslaughter* and *murder*.

Felonious homicide;

1113. MANSLAUGHTER is the unlawful killing of another, without any malice, either express or implied: it is either *voluntary*, upon a sudden heat; or *involuntary*, but in the commission of some unlawful act, not amounting to felony. As to the *first* or *voluntary* branch;—if, upon a sudden quarrel, two persons fight and one of them kill the other, that is manslaughter.⁷ And if two fall out upon a sudden occasion, and agree to fight in such a field, and each go and fetch his weapon, and go into the field, and fight therein, and the one killeth the other, this is no malice prepense; for the fetching of the weapon, and going into the field, is but a continuation of the sudden falling out, and the blood was never cooled. But even in the case of sudden quarrel, where the parties immediately fight, the case may be attended with such circumstances as will indicate malice on the part of the party killing: and the killing then would be murder and not merely manslaughter. If, for instance, the party killing began the attack under circumstances of undue advantage—as if A and B quarrel, and A draw his sword and make a pass at B, and B thereupon draw his sword, and they fight, and B is killed, A would be guilty of murder; for his making the pass before B had drawn his sword, shows that he

manslaughter.

Killing by fighting on a sudden quarrel,

and where no advantage is unfairly taken, is reduced to manslaughter,

(6) It is not necessary to dwell on that branch of felonious homicide comprehended by the term suicide, further than to observe that a *felo de se* is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death; as if attempting to kill another, he runs upon his antagonist's sword; or shooting at another, meets his death by the bursting of the gun. That degree of insanity which screens a man from the punishment incidental to the depriving another of life, will alone exempt him who has committed suicide from being legally judged *felo de se*.

Suicide admits of accessories before the fact, as well as other felonies; for

if one persuades another to kill himself, and he does so, the adviser is guilty of murder as an accessory, if absent; if present, such person is guilty of murder as a principal: and if two encourage each other to murder themselves, and one does so, the other being present, but failing in the attempt on himself, the latter is a principal in the murder of the first; but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident, before the moment when he meant to destroy himself, it will not be murder in either.—4 Black. Com. As to attempts to commit suicide, see § 1127.

(7) 4 Black. Com. 191.

manslaughter'

unless sufficient
time for the
passion to cool,
and then murder.

No provocation
can render
homicide
excusable; the
least it can
amount to is
manslaughter,

and it is murder,
if any evidence
of express
malice.

Involuntary
manslaughter.

sought his blood.⁸ Again, if there was deliberation, as that they met the next day; nay, though it were the same day, if there were such a competent distance of time that, in common presumption, they had time of deliberation, then it is murder.⁹ And the law so far abhors all duelling in cold blood, that not only the principal, but his seconds, are guilty of murder; and it is held, that the seconds of the deceased are likewise guilty.¹ If a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kill the aggressor, though this is not excusable in self-defence, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder, for there is no previous malice, but it is manslaughter. So if a man takes another in the act of adultery with his wife, and kills him directly on the spot, it is manslaughter. It is, however, the least degree of it; and therefore, in such a case, the court directed the burning of the hand (then a part of the penalty for manslaughter and other felonies not punished with death,) to be gently inflicted, because there could not be a greater provocation.² The father was guilty of manslaughter only, who seeing his son's nose bloody, and being told by him that he had been beaten by such a boy, ran three quarters of a mile, and having found the boy, beat him with a small cudgel, whereof he afterwards died.³ Manslaughter, therefore, on a sudden provocation, differs from *excusable homicide in self-defence*, in this, that in one case, there is an apparent necessity for self-preservation, to kill the aggressor; in the other case, no necessity at all, being only a sudden act of revenge, which from the absence of express malice is not adjudged to be murder.⁴

1114. INVOLUNTARY MANSLAUGHTER differs from homicide excusable by misadventure, in this, that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As the trespasser killing another when shooting at deer in a third person's park, is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent

(8) Fost. 295.

(9) 1 Hale, 453.

(1) 1 Hawk. 124. 1 East, 242.
See before, § 835 (8).

(2) 4 Black. Com. 191.

(3) 1 Hawk. 125.

(4) See § 1110.

to do the other any personal mischief. So where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection; as when a workman flings down a stone or piece of timber into a street and kills a man, this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done; if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is a misadventure only; but if it were in London, or in a populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or if, in its consequence, it naturally tend to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.⁵

Involuntary
manslaughter,

1115. "Whoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, —or to be imprisoned for any term not exceeding two years, with or without hard labour, or to pay such fine as the court shall award, in addition to, or without any such other discretionary punishments as aforesaid."⁶

Punishment of
manslaughter.

1116. MURDER⁷ may be defined as the unlawful killing of a human being⁸ *with malice aforethought*; — malice is its essential characteristic, distinguishing this crime from justifiable or excusable homicide, and from such cases of felonious homicide as, not having this, are reduced to manslaughter.

Murder is
constituted by
malice.

1117. The cause of death does not now⁹ need to be stated in the charge; it is enough if the killing be proved to arise

The unlawful
killing may be
caused by any
manner or
means,

(5) 4 Black. Com. 193.

(6) 24 & 25 Vict. c. 100, s. 5.—
Form of charge.—"For having at
—— on (or about) —— feloniously
killed and slain (the deceased)."

(7) Form of charge.—"For having
at —— on (or about) —— feloniously,
wilfully, and of malice afore-

thought, killed and murdered ——."

(8) This does not include killing a
child in its mother's womb; for which
offence, see hereafter, § 1151-2.

(9) "In any indictment," and by
consequence in any charge, "for murder
or manslaughter, or for being an
accessory to any murder or man-

and this although not intended to have a fatal result.

Death must cease within a year and a day, to render killing murder.

Legal "malice" arises from a bad heart in general,

rather than from settled anger against a particular person.

Malice express against individual by words or actions;

from poisoning, striking, starving, suffocating, drowning, or in whatever other form the death may have been brought about. Also, if a man do such an act, of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended; as was the case of the unnatural son, who exposed his sick father to the air against his will, by reason whereof, he died; of the parish officers, who shifted a child from parish to parish, till it died for want of care and sustenance; and of the master, who refused necessary food to his apprentice, and treated him with such continued severity as to occasion his death.¹ In order to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or after the doing of whatever act may have been the cause of death; in the computation of which, the whole day upon which the injury was done, shall be reckoned the first.²

1118. Malice, when technically used in legal descriptions of crime, is to be understood as "badness of heart" in general — "a disposition to commit a wicked action"—rather than in its restricted and more usual signification of the passion of malice³ in particular: the *malice aforethought* (or *premeditation*) which is necessary to constitute murder is not so much spite or malevolence to the deceased individually, "as any evil design in general;" and it is either *express* or *implied*.⁴

1119. Express malice is where there is a deliberate and formed design of taking away the life of a fellow-creature, which is manifested by external circumstances capable of proof; as lying in wait, antecedent menaces, former grudges,

slaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased." 24 & 25 Vict. c. 100, s. 6.

(1) 4 Black. Com. 196.

(2) 3 Inst. 47.—Otherwise it is an

injury with intent to murder.—See hereafter, § 1125-7.

(3) "Some have been led into mistake by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing, for some considerable time before the commission of the act, which is a mistake arising from not well distinguishing between *hatred* and *malice*; envy, hatred, and malice, are three distinct passions of the mind." By Lord Holt, C. J.

(4) 4 Black. Com. 198, 199.

and concerted schemes to do him some bodily harm. If a person kill another in consequence of such a wilful act as shows him to be an enemy to all mankind in general, as coolly discharging a gun amongst a multitude of people: and, if two or more come together to do an unlawful act against the King's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park, and one of them kills a man, it is murder in them all, because of the unlawful act, *malitia præcogitata*, or evil intended beforehand.⁵

or against society, by deliberately doing a dangerous act,

or in the prosecution of an unlawful purpose.

1120. Implied malice is that inference which arises from the nature of the act, though no malice is expressed. If a man kill another without any, or without a considerable provocation, the law implies malice. No affront by words or gestures only is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter, and not murder. In like manner, if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any persons acting in aid of him in endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer will be guilty of murder. And if one intends to do a felony, and undesignedly kills a man, this is also murder. Thus, if one shoots at *A*, and misses *him*, but kills *B*; this is murder, because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for *A*; and *B*, against whom the prisoner had no malicious intent, takes it, and it kills him.⁶

Malice implied,

by circumstances showing an intention to kill or do some grievous bodily harm upon a slight provocation,

or by killing an officer of justice, or others in the execution of their office or duty,

or by an intended felony, although not designed to cause death.

1121. It were endless to go through the cases of homicide which have been adjudged either expressly, or impliedly, malicious; but we may take it as a settled rule that, unless the contrary appear, the law presumes *all* homicide to be malicious, and consequently to amount to murder. It is for

The law presumes malice in all cases of homicide, which it does not command, but the prisoner may rebut this presumption,

(5) 4 Black. Com. 200.

(6) 4 Black. Com. 200.

24 & 25 Vict.
c. 100.
by making out
circumstances
of justification,
excuse, or
alleviation.

the prisoner to bring forward such facts and circumstances as may prove the homicide to be justifiable, or excusable, or that it amounted to no more than manslaughter, being either the involuntary consequence of some act, not strictly lawful, or, if voluntary, occasioned by some sudden and sufficiently violent provocation.⁷

Murder.

1122. The act to consolidate and amend the statute law relating to offences against the person, 24 & 25 Vict. c. 100, enacts (*sec. 1*), "Whosoever shall be convicted of murder shall suffer death as a felon."⁸ (*Sec. 2*.) "Upon every conviction for murder the court shall pronounce sentence of death."⁹

Peremptory
sentence of
death.

Offences
against the
person not
resulting in
actual homicide.

1123. In addition to the provisions relating to murder and manslaughter, the above-cited statute, enacted in 1861, very much simplified the law as to other offences against the person, of which the following are the most likely to come in question before courts martial.

Conspiring or
soliciting to
commit
murder.

1124. *Sec. 4*. "All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor," and liable to penal servitude for not more than ten and not less than three years,—or to imprisonment not exceeding two years, with or without hard labour.

(7) 4 Bl. Com. 201. Before, § 879, 880. It may be observed, that, provided the court martial has jurisdiction in cases of murder where it may be sitting, it is immaterial whether the murder was actually committed or the death took place within or without the Queen's dominions, on land or on sea.—See before, § 10; compare 24 & 25 Vict. c. 100, ss. 9, 68; *Mut. Act*, *sec. 1 & 6*.

(8) This act also provides (*sec. 67*) that "every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour." As to accessories in general, see §

1060-64.

(9) "An act for the more speedy trial of certain homicides committed by persons subject to the mutiny act," (25 & 26 Vict. c. 65) was passed during the last session, in consequence of the so-called *military murders*, and a reluctance to apply the existing provisions of the mutiny act where applicable, or to extend them to those cases where the sufferer was not a superior, or not in the execution of his office. It provides that, under a judge's order, where the prisoner and the deceased were both subject to the mutiny act, the prisoner may be removed to London or Dublin, and there tried with all convenient speed, and, if convicted, may be sentenced to be punished in the county where the offence was committed.

1125. *Sec. 11.* "Whosoever shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing, or shall by any means whatsoever¹ wound or cause any grievous bodily harm to any person, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony,"² and liable to penal servitude for life or not less than three years, or to imprisonment for not exceeding two years, with or without hard labour and solitary confinement.

24 & 25 Vict.
c. 100.
ATTEMPTS TO
MURDER.
Administering
poison, or
wounding with
ink & to
murder.

1126. *Sec. 14.* "Whosoever shall attempt to administer to or shall attempt to cause to be administered to or to be taken by any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony," and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Attempting
to administer
poison, or

shooting or
attempting
to shoot or

attempting to
drown, &c.,
with intent to
murder.

1127. *Sec. 15.* "Whosoever shall, by any means other than those specified in any of the preceding sections of this act, attempt to commit murder, shall be guilty of felony," and liable to penal servitude for life or not less than three years, — or imprisonment not exceeding two years, with or without hard labour and solitary confinement.³

By any other
means at-
tempting to
commit murder.

1128. *Sec. 16.* "Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to

Sending letters
threatening to
murder.

(1) Destroying or damaging a building with gunpowder (*sec. 12*), or setting fire to or casting away a ship (*sec. 13*) with intent to murder are punishable in the like manner.

(2) By the 14 & 15 Vict. c. 19, s. 5, If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant

is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding."

(3) This section, which is entirely new, embraces infernal machines, and has been held to justify a conviction for an attempt to commit suicide.

24 & 25 Vict.
c. 100.

kill or murder any person, shall be guilty of felony," and liable to penal servitude for not exceeding ten years, nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Shooting or
attempting
to shoot, or
wounding with
intent to do
grievous
bodily harm.

1129. *Sec. 18.* "Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony," and liable to penal servitude for life or for not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

What shall
constitute
loaded arms.

1130. *Sec. 19.* "Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this act, although the attempt to discharge the same may fail from want of proper priming or from any other cause."¹

Inflicting
bodily injury,
with or without
weapon.

1131. *Sec. 20.* "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour.

Attempting to
choke, &c. in,
order to commit
any indictable
offence.

1132. *Sec. 21.* "Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases, thereby to assist any other person in committing, any indictable offence, shall be guilty of felony," and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour.

(1) This clause was introduced to meet every case where a prisoner attempts to discharge a loaded rifle,

&c., but which misses fire for want of priming, cap, or other like cause.—*Greaves*, p. 32.

1133. *Sec. 22.* "Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to or attempt or cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour.

24 & 25 Vict.
c. 100.
Using chloro-
form, &c., to
commit any
indictable
offence.

1134. *Sec. 23.* "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony,"² and liable to penal servitude not exceeding ten years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour.

Maliciously
administering
poison, &c., so
as to endanger
life or inflict
grievous
bodily harm.

1135. *Sec. 24.* "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, shall be guilty of a misdemeanor," and liable to penal servitude for three years or to imprisonment not exceeding two years, with or without hard labour.

Maliciously
administering
poison, &c.,
with intent to
injure, aggrieve,
or annoy any
other person.

1136. *Sec. 28.* "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

Causing bodily
injury by
gunpowder.

1137. *Sec. 29.* "Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or put or lay at any place or

Causing
gunpowder to
explode,
or sending to
any person an
explosive sub-
stance, or
throwing
corrosive fluid

(2) If the court be not satisfied that any person charged under this section is guilty of felony, but shall be satis-

fied that he is guilty of the misdemeanor in section 24, they may find him guilty accordingly.—*Sec. 25.*

24 & 25 Vict.
c. 100.

on a person,
with intent to
do grievous
bodily harm.

cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive³ or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony," and liable to penal servitude for life or for not less than three years, — or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Drivers of
carriages in-
juring persons
by furious
driving.

1138. *Sec. 35.* "Whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor," and liable to be imprisoned for any term not exceeding two years, with or without hard labour.

ASSAULTS.

Assault a minor
offence included
in crime
attended with
violence.

1139. An assault is an *attempt* or *offer* to commit any forcible crime against the person of another, such as battery, murder, robbery, rape, and so forth. It may be found when the evidence fails to prove the greater offence charged against the prisoner, and is an offence punishable at common law, by fine or imprisonment, or both, the measure of which, except in cases expressly provided for by statute, is at the discretion of the court. As to assaults the act provides (*sec. 38*), "Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist, to prevent the lawful apprehension or detainer of himself or any other person for any offence, shall be guilty of a misdemeanor and liable to imprisonment not exceeding two years with or without hard labour. (*Sec. 47.*) "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be impri-

Assaults with
intent to
commit felony,
or resist
peace officers,
or resist
apprehension.

Assaults
occasioning
bodily harm.

(3) Boiling water held to be "destructive." — *Reg. v. Crawford*, 2 Carington and Keane, 129.

Unlawfully throwing wood &c. upon, or otherwise obstructing a railway with intent to endanger safety, is (*sec.*

32) a felony punishable by penal servitude for life.

(4) The 1 Geo. 4, c. 4, from which this clause is taken, was confined to stage-coaches and public carriages.

soned for any term not exceeding two years, with or without hard labour: and whosoever shall be convicted upon an indictment for a common assault⁵ shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour.

24 & 25 Vict.
c. 100.

Common
assault.

1140. The crimes of sodomy, rape, and defilement of women and children are so clearly and succinctly noticed in the sections of the 24 & 25 Vict. c. 100, which follow, that it would be scarcely possible to compress their meaning into briefer terms. Indeed the adaptation of language to that horrible crime, which our law describes in its very indictments as unfit to be named amongst Christians, would be of itself so painful as to render the adoption of technical terms desirable. The difficulties formerly attending the conviction of this crime, and that of rape, from the peculiarity of the facts requisite to be given in evidence, are obviated by the following enactment, which was called for as much by public decorum as to prevent failures of justice. (*Sec. 63.*) "Whenever upon the trial for any offence punishable under this act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."

Unnatural and
indecent
assaults, and
offences against
the person of
women.

Carnal
knowledge
defined.

1141. Rape is defined to be the carnal knowledge of a woman without her consent. The woman ravished is a competent witness, but the credibility of her testimony, and how far she is to be believed, must be left to the jury, upon the circumstances of fact that concur in that testimony; for instance, if the witness be of good fame; if she presently discover the offence, and make search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence; but, on the other side, if she be of evil fame,⁶ and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the act was alleged to have been com-

Definition of
rape;

party ravished
may give
evidence;

(5) Mere words cannot in any case amount to an offence against the person, but striking at another (without hitting), with or without a weapon, or any other act indicating an intention to use violence, is an *assault*.

(6) It is no excuse that the woman is a common strumpet, or the concubine of the ravisher, although the evidence would need, in such case, to be proportionably strong.—1 *Hale*, 729.

24 & 25 Vict.
c. 100.

a child on
whom the
offence may be
perpetrated,
is competent
to give
evidence;

actual force
necessary to
constitute
rape;

a male under
fourteen can-
not commit
rape.

Punishment
of rape.

Procuring the
defilement of
girl under age.

Carnally
knowing a
girl under
ten years of
age.

mitted, was where it was possible she might have been heard and she made no outcry, these and the like circumstances carry a strong, but not conclusive presumption, that her testimony is false or feigned.⁷ The admissibility of the evidence of a child, under ten or twelve years of age, on whom this crime may have been committed, rests, as in other cases, on the development of her mental faculties, and on her capability to judge of the obligation of an oath. Actual force is necessary to constitute the crime of rape; it was held by a majority of the judges, that having carnal knowledge of a married woman, under circumstances that induced her to suppose that the offender was her husband, does not amount to rape.⁸ A male infant, under the age of fourteen years, is presumed by law incapable to commit a rape,⁹ and therefore, must be acquitted, if tried as a principal in the first degree, but he may be convicted of an assault,¹ and may, as may also the woman's husband, or a woman, be a principal in the second degree, and punished in like manner as the actual perpetrator for aiding and abetting.²

1142. *Sec. 48.* "Whosoever shall be convicted of the crime of rape shall be guilty of felony," and liable to penal servitude for life, or for not less than three years, or to imprisonment not exceeding two years, with or without hard labour.

1143. *Sec. 49.* "Whosoever shall, by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of twenty-one years, to have illicit carnal connection with any man, shall be guilty of a misdemeanor," and liable to imprisonment for not exceeding two years, with or without hard labour.

1144. *Sec. 50.* "Whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years, shall be guilty of felony,"³ and liable to penal servitude for

(7) 4 Black. Com. 213.

(8) *Rex v. Jackson*, Russ. and Ry. 487. But if a woman yield through fear of death, it is a rape; or if the connection take place when she is in a state of insensibility from liquor given by the prisoner (though the liquor was not given with a view to a rape) it is a rape.—*Arch.* 610.

(9) 2 Black. Com. 212.

(1) *Reg. v. Brimlow*, 9 C. & P. 629.

(2) 1 Hale, 639.

(3) The evidence in this offence, and that in the following section (§ 1145), is the same as in rape, with the exception that the act is equally punishable if done with the consent of the child. See also § 832, 834, 1146.

life or not less than three years, — or to imprisonment not exceeding two years, with or without hard labour.

24 & 25 Vict.
c. 100.

1145. *Sec. 51.* "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, shall be guilty of a misdemeanor," and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour.

Carnally
knowing a
girl between
the ages of ten
and twelve.

1146. *Sec. 52.* "Whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour."

Attempts to
commit abuse of
girls, or rape.

1147. *Sec. 53.* "Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour."⁴

Abduction of
a woman
against her
will, from
motives of
lucre.

Fraudulent
abduction of
a girl under
age against
the will of
her father, &c.

1148. *Sec. 54.* "Whosoever shall, by force, take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married

Forceful
abduction of
any woman
with intent to
marry her.

(4) Persons convicted of any offence against this section, are incapable of taking any estate or interest, legal or equitable, in any real or per-

sonal property of such woman, or which shall come to her as heiress, co-heiress, or next of kin.

24 & 25 Vict.
c. 100.

or carnally known by any other person, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour.

Abduction of
a girl under
sixteen years
of age.

1149. *Sec. 55.* "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor," and liable to be imprisoned for any term not exceeding two years, with or without hard labour.

Bigamy.

1150. *Sec. 57.* "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony," and liable to penal servitude not exceeding seven years nor less than three years,—or to imprisonment not exceeding two years, with or without hard labour.⁵

Abortion and
attempts to
procure
abortion.

1151. *Sec. 58.* "Whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony," and liable to penal servitude for life or not less than three years,—or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Procuring
drugs, &c. to
cause abortion.

1152. *Sec. 59.* "Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor," and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour.

Concealing the
birth of a
child.

1153. *Sec. 60.* "If any woman shall be delivered of a child, every person⁶ who shall, by any secret disposition of the

(5) It is provided that this does not extend "to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of

seven years then last past, and shall not have been known by such person to be living within that time."

(6) Under former enactments, it was necessary to prove that the mo-

dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor," and liable to imprisonment not exceeding two years, with or without hard labour.⁷

24 & 25 Vict.
c. 100.

1154. Sec. 61. "Whosoever shall be convicted of the abominable crime of buggery, committed either with man-kind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than ten years."

Sodomy and
bestiality, or

1155. This crime may be committed by man with man, or in the same unnatural manner with woman, or by man or woman with beast; and the rule of law herein is, that if the parties are arrived at years of discretion, and both acting and consenting, that each shall incur the punishment due to the crime. It has been remarked of this offence, as of rape, that it is a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished; but it is an offence of so black a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of crime itself.⁸

the unnatural
crimes.

1156. Sec. 62. "Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor," and liable to penal servitude for not exceeding ten years, nor less than three years, or to imprisonment not exceeding two years, with or without hard labour.

Attempt to
commit an
infamous
crime.

1157. Offences against property may be considered under the heads of *Larceny* and similar offences, including *Burglary* and *Embezzlement*; *Malicious Injuries*, including *Arson*; and, lastly, *Forgery*; and, as has been done in respect to offences against the person, the arrangement of the several Criminal Law Consolidation Acts will be followed in

24 & 25 Vict.
c. 96.

OFFENCES
AGAINST
PROPERTY.

ther participated in the endeavour to conceal the birth, but this clause includes every person who uses such endeavour, and it is quite immaterial under it whether there be any evidence against the mother or not.—*Greaves*, p. 57.

(7) This section further provides, if the person tried for the murder of any child shall be acquitted thereof, and it appear in evidence that the

child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof, that the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of the birth.

(8) 4 Black. Com., 215. As to threats of accusing, see § 1178-9.

24 & 25 Vict.
c. 96.

Bailees fraudulently converting property guilty of larceny.

Punishment for simple larceny, or theft.

Essential points in the proof of larceny.

TAKING

from another.

respect to those offences, omitting those which courts martial may be less probably called upon to try under the provisions of the articles of war.

1158. The act for consolidating and amending the statute law as to larceny and other similar offences, (24 & 25 Vict. c. 96) enacts (*sec. 3*), "Whosoever, being a bailee¹ of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction."

1159. *Sec. 4*. "Whosoever shall be convicted of simple² larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

1160. To constitute larceny (*theft*) there must be, *First*, a felonious taking;³ *Secondly*, a carrying away; *Thirdly*,—from the possession (constructive or actual) of the person named in the indictment or charge, his property,—either actually belonging to him, or in his custody as bailee.

1161. *First*.—The taking must be from another: a wife therefore cannot be guilty of larceny in taking the goods of her husband, because they are one in law. So a part owner of personal property cannot be guilty of larceny in taking it out of the possession of his co-partner, except the person in whose possession the property may be, is personally responsible

(1) The technical name of the person having the property of another person in his custody.

(2) Compound larceny is—not repeated theft, but stealing from the house, or person; or with other circumstances of aggravation.

The act (*sec. 5*) provides that three larcenies within six months may be tried in one indictment; and (*sec. 71*) makes a similar provision as to dis-

tingent acts of embezzlement; but this joining of several instances has always been the rule at courts martial, and even as respects wholly dissimilar offences. See § 401.

(3) The thing taken must be of some intrinsic value, though it need not be of the value of the least coin known to the law, i. e. not worth a farthing.—*Reg. v. Morris*, 9 C. & P. 349.

for it,⁴ in which case a co-partner stealing property, is guilty of larceny; as a man may be, who steals his own goods, for instance, from a pawnbroker, or from any person to whom he has delivered and entrusted them, with intent to charge such bailee with the value.⁵

24 & 25 Vict.
c. 96.

1162. The taking must be *felonious*, that is, done *animo furandi*, or with an intention of stealing;—without any claim or pretence of right, and with intent wholly to deprive the owner of his goods and to appropriate or convert them to the taker's own use, otherwise the taking of another's property is a trespass only, and not an indictable offence.

with felonious
intent.

1163. In deciding as to the intent, no general rules can apply, as the evidence must always be circumstantial, and consequently peculiar; and it is an admitted principle, that in every case of alleged larceny, the questions, whether the defendant took the goods knowingly or by mistake—whether he took them *bonâ fide* under a claim of right, or otherwise—and, whether he took them with an intent to return them to the owner, or fraudently with intent to deprive the owner of them altogether, and appropriate or to convert them to his own use—are questions entirely for the consideration of the jury, (or the members of a court martial) to be determined by them, upon a view of the particular facts of the case.⁶

Questions of
felonious
intent to be
determined
according to
the evidence
in each par-
ticular matter
before the
court.

1164. There are however many cases, where, although there is a delivery of the goods by the owner, yet the possession in law remains in him, and larceny may be committed;⁷ as in the case of a servant, who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like; or of the guest at an inn, who steals the plate set before him, of which he has not had the possession delivered to him, but merely the use.⁸

1165. *Secondly.*—It is necessary to prove a *carrying away*. The slightest removal of the chattel from the place in which

The carrying
away.

(4) *Rex v. Phoebe Bramley*. R. & R. 478.

(5) 4 Black. Com. 231. If a man steal his own goods from his own bailee, though he has no intent to charge such bailee, but to defraud the customs of certain duties payable thereon, yet if the bailee had an in-

terest in the possession, and could have withheld it from the owner, the taking is larceny.—*Rex v. Wilkinson*, R. & R. 470.

(6) Archbold, 284.

(7) See "Larceny and Embezzlement by Servants," § 1197.

(8) 1 Hale, 506. See § 1199.

24 & 25 Vict.
c. 96.

it was found, will be sufficient. The prisoner had lifted a bag from the bottom of the boot of the Exeter mail, but was detected before he had got it out; it did not appear that it was entirely removed from the space it had first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that identical part had occupied; this was held by the twelve judges to be a carrying away sufficient to constitute larceny.⁹

Property
stolen must
be the actual
or constructive
possession of
the party
specified in
the charge.

1166. Thirdly.—It must be proved that the goods stolen were the property of the person set forth in the indictment or charge, either as the owner or bailee. Under this head, there are many refinements of law, which can scarcely be the subject of consideration by courts martial; ¹⁰ the principal of which are, that when the bailor steals his own goods, they should be charged as the goods of the bailee.¹ It was formerly necessary to state each partner's name in the indictment, where the stolen goods were the property of several; but the 7 Geo. 4. c. 64, s. 14, has removed this difficulty, by declaring it sufficient to name one, "and to state the property to belong to the person so named and another or others, as the case may be."²

Where goods
are the prop-
erty of
several, they
may be charged
as the property
of one.

Stealing
horses, cows,
sheep, &c.

1167. As to larceny of cattle, the 24 & 25 Vict. c. 96, enacts (*sec.* 10), "Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony," and liable to penal servitude for fourteen years nor less than three years, with or without hard labour and solitary confinement. (*Sec.* 11.) "Whosoever shall wilfully kill³ any animal, with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the

Killing animals
with intent
to steal the
carcase, &c.

(9) *Rex v. Walsh*, R. & M. 14.

(10) See before, § 391-3. As to power of court to amend variances, see § 846-8. The mentioning of any person by a name of office or other descriptive appellation instead of his proper name, no longer vitiates an indictment.—14 & 15 Vict. c. 100, s. 39.

(1) *R. v. Wilkinson and Marsden*,

R. & R. 470.

(2) Other clauses provide, that property belonging to counties may be laid in the inhabitants; property for the use of the poor of parishes, in the overseers; materials for the repair of roads, in the surveyor, &c.; without specifying in either of the foregoing cases the names of any.

(3) Compare § 1219.

offence of stealing the animal so killed would have amounted to felony."

24 & 25 Vict.
c. 96.

1168. *Sec. 29.* "Whosoever shall, either during the life of the testator or after his death, steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony," and liable to penal servitude for life or for not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.⁴

Wills or
codicils.

1169. As to larceny from the person, and other like offences, by *sec. 40*, "Whosoever shall rob⁵ any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony," and liable to penal servitude for fourteen years and not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Robbery or
stealing from
the person.

1170. Larceny from the person by open and violent assault,⁵ falls under the description of robbery, but should the prisoner be charged with stealing from the person, and it appear in evidence that he is actually guilty of robbery, he is not on that account entitled to an acquittal.⁶

The offence
may be found
whether the
theft effected
by stealth or
violence.

1171. *Robbery* is the felonious and forcible taking of any property from the person of another, or in his presence, against his will. It will be observed that this offence differs from simple larceny inasmuch as the taking must be forcible,⁷ and from larceny from the person, as it may be committed by taking from another *in his presence* only, as where a robber by menaces or violence puts a man in fear and drives away his cattle before his face.⁸

Robbery,
definition of.

The taking
must be
forcible;

1172. To maintain this charge, the force proved may be either actual, or constructive, by putting in fear. With respect to the former it is not necessary that there should be an actual injury to the person: it is sufficient to show that

by actual
violence;

(4) This section also provides that other remedies at law or in equity are not to be affected.

(5) See definition of "Assault," § 1039.

(6) *R. v. Joseph Pearce, R. & R.* 174. See before, § 831.

(7) The taking must be complete; otherwise it is no robbery, but assaulting with intent to rob, or demanding property by menaces; as to which offences, see § 1173-77.

(8) 1 Hale, 533.

24 & 25 Vics.
c. 96.

or by putting
in fear.

On trial for
robbery, a
court martial
may convict
of an assault
with intent
to rob.

Assault with
intent to rob.

there was a struggle, or that the property was wrested from the person by some considerable degree of violence, as where the prisoner laid violent hold of the prosecutor's watch, which was secured by a steel chain round his neck, and, by two or three jerks, broke the chain and made off with the watch; it was held unanimously by the judges, that the degree of violence here employed was sufficient to justify a conviction of robbery, because the prisoner could not obtain the watch at once, but had to overcome the resistance of the steel chain by actual force.⁹ The crime may equally be committed by putting in fear (either by threats¹ or gestures) to such a degree as might create an apprehension of danger in a mind of ordinary firmness, sufficient to induce a surrender of property to him who had no pretence of claim to it, and in this case, if the circumstances thus proved be such as are calculated to create such a fear, it is not necessary to pursue the enquiry further, and examine whether the fear actually existed.²

1173. *Sec. 41.* "If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

1174. *Sec. 42.* "Whosoever shall assault any person with intent to rob shall be guilty of felony," and (except in the cases where a greater punishment is provided by this act) be liable to penal servitude for three years, or to imprison-

(9) *R. v. George Mason, R. & R.*
419.

(1) Obtaining money by threatening a charge for an infamous crime, had been holden to be robbery, even where

the prosecutor parted with his money from a fear merely of losing his character, but this offence is now expressly declared felony.—See § 1178.

(2) Foster, 128-129.

ment not exceeding two years, with or without hard labour and solitary confinement.

24 & 24 Vict.
c. 96.

1175. *Sec. 43.* "Whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob, any person, or shall, together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony," and liable to penal servitude for life, or not less than three years or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Robbery or assault by a person armed, or by two or more, or robbery and wounding.

1176. *Sec. 44.* "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Letter, demanding money, &c., with menaces.

1177. *Sec. 45.* "Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony," and liable to penal servitude for three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Demanding money, &c. with menaces, or by force, with intent to steal.

1178. *Sec. 46.* "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as herein-after defined, with a view

Letter threatening to accuse of crime, with intent to extort;

(3) "The abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, pro-

mise, or threat, offered or made to any person, whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act."—*Sec. 46.*

24 & 25 Vict.
c. 96.

or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security, or other valuable thing, from any person, shall be guilty of felony," and liable to penal servitude for life, or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Accusing or threatening to accuse, with intent to extort;

1179. *Sec. 47.* "Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour.

immaterial from whom the menaces proceed.

1180. *Sec. 49.* "It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person."

SACRILEGE.
Breaking and entering a church or chapel and committing any felony.

1181. *Sec. 50.* "Whosoever shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit any felony therein, or being in any church, chapel, meeting-house, or other place of divine worship shall commit any felony therein and break out of the same, shall be guilty of felony," and liable to penal servitude for life, or not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

BURGLARY.
no longer a capital offence.

1182. *Sec. 52.* "Whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and solitary confinement."

breaking and entering by night;

1183. BURGLARY at common law is defined "a breaking and entering by night the dwelling-house of another, with intent to commit felony within the same, whether the

felonious intent be executed or not:"⁴ and here it is to be observed, that breaking without entering, and entering without breaking,⁵ is not burglary. But by the 24 & 25 Vict. c. 96, s. 51., "Whosoever shall enter the dwelling-house of another with intent⁶ to commit felony therein, or being in such dwelling-house, shall commit felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary."

24 & 25 Vict. c. 96.

Burglary; entering with intent to commit felony, and breaking out at night; or actually committing felony, and breaking out at night.

1184. Many questions formerly arose as to the meaning of *night time*, but the 24 & 25 Vict. c. 96, s. 1, enacts, "For the purposes of this act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day."

Definition of night for the purpose of the act 24 & 25 Vict. c. 96.

1185. The slightest removal of a bar or bolt; or lifting up a latch, or unloosing any other fastening which the owner has provided; as opening a window on its hinges, fastened by a wedge;⁷ or the lowering a sash window, kept in its place only by the weight, though the shutters attached to the window be not fastened;⁸ the entering of a chimney;⁹ or by taking out the glass of a door;¹⁰ are held to be breaking sufficient to constitute burglary: so also to knock at a door, and, upon its being opened, to rush in with a felonious intent;¹ or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search the house, and then to bind the constable and rob the inhabitants, have been adjudged burglarious;² though there has been no actual breaking: but opening the lock of an area door by a skeleton key, and passing into the dwelling-house by an open door;³ pushing a window wide open which had been left

An actual breaking is complete, however slight.

Constructive breaking by some artifice or trick.

Cases of entering adjudged not to be breaking.

(4) 1 Hawk. 159.

(5) As to entering in the night, see § 1189; as to housebreaking, see § 1192.

(6) "The *intent* to commit felony must be made appear, by the admission of the prisoner, or by attendant circumstances, of which the jury or the court martial will judge. The actual commission of felony after the entry of a house, is the best evidence of the intention: and the bare fact of a man's breaking into a house in the

night time, is evidence of the intent to steal, sufficiently strong to warrant conviction, unless a contrary intention be proved."—*Rex v. Brice*, R. & R. 450.

(7) *Rex v. Hull*, R. & R. 355.

(8) *Rex v. Haines and Harrison*, R. & R. 457.

(9) 1 Hawk. 160.

(10) *Rex v. Smith*, R. & R. 417.

(1) 1 Hawk. 161.

(2) *Id.*

(3) *Rex v. Davis*, R. & R. 322.

24 & 25 Vict.
c. 96.

a little open, and thereby gaining an entrance; ⁴ entering by an open cellar window; ⁵ are not acts, which amount to a burglarious breaking and entering; although they are liable as felonies by a recent amendment of the law, hereafter (§ 1189-93) quoted. If a servant conspire with a robber, and let him into the house, it is burglary in both: so, if some stand back to watch, whilst others enter and rob, they are guilty of burglary; for in all such cases, the act of one is, in judgment of law, the act of all.⁶

Breaking on
the inside;

1186. A burglary may be committed by *breaking on the inside*; for though a thief enter a dwelling-house in the night time by an outside door left open, or by an open window, yet if, when in the house, he turn a key or unlatch a chamber door with intent to commit felony, it is burglary: ⁷ and this holds good of a servant, or of a person lodging or (quartered) in the same house, or in a public inn, who opens and enters another's door with evil intent.¹

by an inmate,
servant, or
guest.

A servant lay in one part of the house and his master in another; between them was a door at the foot of the stairs, which was latched; the servant in the night drew the latch, and entered his master's chamber in order to murder him; this was held to be burglary,² as was also the case of a servant, who opened his lady's chamber door, which was fastened with a brass bolt, with design to commit a rape.³

what is deemed
a mansion or
dwelling-house.

1187. It must be a mansion or dwelling-house, that is to say, any permanent building in which the occupier or any part of his family usually *sleep* at night.⁴ An occupation by day, the occupier taking his meals therein, but sleeping in another house, does not constitute a dwelling-house; but if a part of his family or domestic servants sleep and have their meals in it, it will be sufficient, though the prosecutor may have removed to another house, without intention of

(4) *Rex v. Smith*. 1 Mood., C.C. 178.

(5) *Rex v. Lewis*, 2 C. & P. 628.

(6) 1 Hawk. 162.

(7) 2 East, 488.

(1) 1 Hale, 553, 554.

(2) 2 East, 488.

(3) 1 Strange, 481.

(4) The mere temporary absence of the owner and his family will not

deprive the house of the protection the law gives it, as if a man have a town and country house, and while he is in the country, his town house be broken open: (1 Hale, 566), or if a man lock up his house and go on a journey, and during his absence, it is broken and entered.—*R. v. Murray*, 2 East, 496.

returning; but not when the persons were employed in a trade, and had not their meals in the house, though sleeping in it. Chambers in an inn of court, or rooms in a college, are deemed a distinct dwelling-house for this purpose.⁵ A burglary in any apartment of a palace, is a burglary in the mansion of the King:⁶ and the house of a corporate body, inhabited in separate apartments by the officers of the body corporate, is a mansion-house of the corporation.⁷ It is therefore presumed, that burglary in an officer's quarter in a barrack, is, in law, a burglary in a dwelling-house of the board of ordnance. It has been ruled, that stealing in a dwelling, consisting of the whole of the upper part of the invalid office at Chelsea, the under part being occupied as an office, government paying rent and taxes for the whole, was not rightly charged as the dwelling of the occupant.⁸

24 & 25 Vict.
c. 96.

1188. The term dwelling-house, in its legal signification, includes all out-houses occupied, and communicating immediately with the dwelling-house; but by the present act (sec. 53), "No building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other."

What buildings
are deemed part
of the dwelling-
house.

1189. Sec. 54. "Whosoever shall enter any dwelling-house in the night, with intent to commit any felony therein, shall be guilty of felony," and liable to penal servitude not exceeding seven years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.⁹

Entering a
dwelling-house
in the night
with intent to
commit any
felony.

1190. Sec. 55. "Whosoever shall break and enter any building, and commit any felony therein, such building

Breaking into
any building
within the

(5) 1 Hawk. 163. 1 Hale, 556.

(6) 1 Leach, 364.

(7) *Ib.*

(8) *Rex v. Peyton.* 1 Leach, 364.

Any technical variance in the charge in this point is of the less consequence, as it may be remedied by a special finding.—§ 851-4.

(9) This is a new clause, and meets the case where there is not sufficient proof that the house has been broken

into, but there is no moral doubt that it had been so; and also cases where any door or window has been left open, and the prisoner has entered by it in the night. Upon a trial for burglary, with intent to commit a felony, if the proof of the breaking should fail, the prisoner may nevertheless be convicted of the offence created by this clause.—*Greaves*, 107.

24 & 25 Vict.
c. 96.

curtilage which
is no part of the
dwelling-house
and committing
any felony.

being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned," "or being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Breaking into
any house, shop,
warehouse, &c.,
and committing
any felony.

1191. *Sec. 56.* "Whosoever shall break and enter any dwelling-house, school-house, shop, warehouse, or counting-house, and commit any felony therein, or, being in any dwelling-house, schoolhouse, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

Housebreaking,
&c., with intent
to commit any
felony.

1192. *Sec. 57.* "Whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, schoolhouse, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony," and liable to penal servitude not exceeding seven years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.'

Being armed
with intent to
break and enter
any house in
the night.

1193. *Sec. 58.* "Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock, key, crow, jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling-house or other building whatsoever with intent to commit

Or having house
breaking tools,

or being
disguised.

(1) This is also a new clause, and remedies an inconsistency in the former law, by which an act done after nine o'clock was a felony punishable by transportation, and the same act done just before nine only a misde-

meanor. On a trial for burglary, if it should appear the breaking and entry were before nine o'clock, the prisoner might be punished under this clause.—*Greaves*, 110; and see § 1189.

any felony therein, shall be guilty of a misdemeanor," and liable to penal servitude for three years, or imprisonment not exceeding two years, with or without hard labour.²

24 & 25 Vict.
c. 96.

1194. *Sec. 60.* "Whosoever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of five pounds or more, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

Stealing in a
dwelling-house
to the value of 5l.

1195. *Sec. 61.* "Whosoever shall steal any chattel, money, or valuable security in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three years, or to imprisonment not exceeding two years with or without hard labour, and with or without solitary confinement.

Stealing in a
dwelling-house
with menaces.

1196. *Sec. 64.* "Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

WRECKING.

Stealing from
ship in distress
or wrecked

1197. The act also provides as to larceny or embezzlement³

(2) The like, after a previous conviction for felony, punishable by ten years' penal servitude.—*Sec. 59.*

(3) EMBEZZLEMENT is when a person fraudulently converts to his own use property which he has had authority to receive, or take possession of, for another; for which reason there could not in this case be a *taking* of the property to constitute larceny, nor could the offender commit a felony in respect to it, at common law, which gave the injured party his remedy by civil process.

It was formerly held, that upon an indictment for larceny, if an embezzlement were proved, the prisoner must be acquitted, and *vice versa*. The distinctions between these offences were so very fine drawn, that until the facts were disclosed on the trial, it

was difficult, even for lawyers by profession, to know under which head a particular offence would come; and although, in the criminal courts of this country it was customary to indict a prisoner for larceny and embezzlement in separate counts, failures of justice were the not unfrequent result of these subtleties. This defect of the law was remedied by Lord Campbell's act for improving the administration of criminal justice, which became law in 1851, and this clause, as it now stands in the present act, (*sec. 72*), provides upon the trial of any person indicted for embezzlement, fraudulent application or disposal of chattels, money, &c., as a clerk, servant, or person employed for the purpose, or in the capacity of a clerk or servant, or persons in the Queen's

24 & 25 Vict.
c. 96.

Larceny by
clerks or
servants,
or persons
occasionally
employed
as such.

Embezzlement
by clerks or
servants,

Of property in
the constructive
possession of
employers.

LARCENY BY
TENANTS OR
LODGERS.

Tenant or lodger
stealing chattel
or fixture let to
hire with house
or lodgings,

If above the
value of 5*l*.

by clerks, servants, or persons in the public service (*sec.* 67), "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony," and liable to penal servitude not exceeding fourteen years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

1198. *Sec.* 68. "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable," to penal servitude not exceeding fourteen years nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.⁴

1199. *Sec.* 74. "Whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony," and liable to imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement, "and in case the value of such chattel or fixture shall exceed the sum of five pounds," shall be further liable to penal servitude for seven and not less than three years.

service, or in the police, if it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted; but may be found guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, as the case may be:

and *vice versa*, if tried for larceny. *Sec.* 88 makes a similar provision as to obtaining money, &c., by false pretences.—See § 1200.

(4) Sections 69 and 70 make similar provisions as to embezzlement and larceny by persons in the Queen's service, or by the police. See also § 200.

1200. *Sec. 88.* "Whosoever shall by any false pretences⁵ obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour and with or without solitary confinement: provided, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts."⁶

24 & 25 Vict.
c. 93.
CHEATING.
Obtaining
money, &c., by
false pretences,
a misdemeanor.

No acquittal be-
cause the offence
amounts to
larceny.

1201. As to receivers of stolen goods,⁷ it is enacted, by *sec. 91*, "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this act, such person knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a *substantive* felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and every such receiver; howsoever convicted, shall be liable" to penal servitude not exceeding fourteen years nor less than seven years, or to imprisonment not exceeding two

Receivers of
stolen property.

when the
original offence
was *felony*;

how triable,

how punished.

(5) The 8 & 9 Vict. c. 109, s. 17, enacts, "That every person who shall by any fraud or unlawful device or ill practice, in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person, to himself or any other, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing by a false pretence, with intent to cheat or defraud, and being convicted thereof, shall be punished accordingly."

(6) This section also provides that it is not necessary to prove an intent to defraud any particular person, but merely that the party accused did the act charged with an intent to defraud. *Sec. 89*, that the cheat is equally punishable if the money or thing be paid or delivered to any person other than the person making a false pretence.

(7) It is more common, in cases where it might be supposed that the court would not award penal servitude for the civil offence, to try military offenders for disgraceful conduct, under the ordinary provisions of the mutiny act and articles of war.

24 & 25 Vict.
c. 96.
Receivers,
where the
original offence a
misdemeanor.

years, with or without hard labour or solitary confinement. And by *sec. 95*, "Whosoever shall receive any chattel, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made misdemeanor by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, shall be guilty of a misdemeanor," triable as in the former case (§ 1201), and liable on conviction to penal servitude for seven or not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

The charge may
be in the
alternative,

1202. The act also provides that (*sec. 92*), In any indictment containing a charge of feloniously stealing any property (such as burglary, housebreaking, &c.) a count or counts for feloniously receiving the same knowing the same to have been stolen, may be added, and *vice versâ* in any indictment for feloniously receiving any property; and the jury may find a verdict of guilty, either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen. If two or more persons^a are tried together, all or any may be found guilty either of stealing the property or of receiving the same, or any part thereof, or one or more may be found guilty of stealing, and the other or others may be found guilty of receiving.

but finding must
be precise.

24 & 25 Vict.
c. 97.

ARSON:
at common law,

1203. The statute law relating to malicious injuries to property was consolidated and amended by the 24 & 25 Vict. c. 97. The wilful and malicious burning of the house of another is a felony at common law; modern statutes have specified the burning of the offender's own house and numerous cases of arson which were not otherwise provided for. This felony is no longer capital in any case.

extended by
statute.

Malice.

how proved.

1204. The absence of malice or spite to the owner is no defence in this or any other case of malicious injury to property,⁹ nor need the intent to injure any particular person be stated in the charge.¹ As a general rule, if the act be proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved; but in the case of a man burning his own property (§ 1203), the intent to injure or defraud must be proved from other circumstances.

(8) By *sec. 93*, separate receivers may be tried together in the absence of the principal.

(9) 24 & 25 Vict. c. 97, s. 58. As to the legal use of "Malice," see § 1118.
(1) 24 & 25 Vict. c. 97, s. 80.

1205. The intent or an attempt to burn is not sufficient ; the words of the statute are "*set fire to*," and therefore the offence is not complete without an actual setting on fire to the building, or other property specified in the statute, however trifling it may be, or however soon extinguished.

24 & 25 Vict.
c. 97.
The firing must
be actual to con-
stitute arson,

1206. In those cases where the offence, if complete, would have been felony, the attempt (provided there is proof of some *overt act*) is declared felony, — in the case of buildings or goods in buildings, (*sec.* 1-7) punishable (*sec.* 8) by fourteen years' penal servitude, — and in the case of crops or stacks (*sec.* 16, 17) punishable (*sec.* 18) by seven years' penal servitude. Where the complete offence does not amount to felony the attempt is merely a misdemeanor.

but attempts
are punishable
according to the
nature of the
designed offence.

1207. The other offences, which are punishable under the act relating to malicious injuries to property,² and which it may be useful to recapitulate, do not appear to call for any observation, and will be best described in the words of the statute.

Statutes re-
lating to arson
and other mali-
cious injuries
to property.

1208. *Sec.* 1. "Whosoever shall unlawfully and maliciously *set fire to* any church, chapel, meeting-house, or other place of divine worship, shall be guilty of felony," and be liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Setting fire to a
church or
chapel.

1209. *Sec.* 2. "Whosoever shall unlawfully and maliciously *set fire to* any dwelling-house, any person being therein, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Setting fire to a
dwelling-house
any person
being therein.

1210. *Sec.* 3. "Whosoever shall unlawfully and maliciously *set fire to* any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or any farm building, or to any building or erection used in farming

Setting fire to a
house, outhouse,
manufactory,
farm build-
ing, &c.

(2) Except in cases calling for the condign punishment provided by statute, malicious injuries to property are punishable, under the 107th article, — in the case of officers, by cashiering or other punishment, and in the case of soldiers, by a regimental court mar-

tial. In addition to any other punishment a court martial may award, the court may direct any offender to be put under stoppages, until he has made good the destruction, damage, or injury of any property whatsoever. — *Art. War*, 132.

24 & 25 Vict.
c. 97.

land, or in carrying on any trade or manufacture, or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

Setting fire to
any railway
station,
warehouse,
engine-house, &c.

1211. *Sec. 4.* "Whosoever shall unlawfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, port, dock, or harbour, or to any canal or other navigation, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour.

Setting fire to
any public
building.

1212. *Sec. 5.* "Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this act before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour.

Setting fire to
other buildings.

1213. *Sec. 6.* "Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this act before mentioned, shall be guilty of felony," and liable to penal servitude for fourteen years and not less than three years, or imprisonment not exceeding two years, with or without hard labour.

Setting fire to
goods in any
building the
setting fire to
which is felony.

1214. *Sec. 7.* "Whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony," and liable to penal servitude not exceeding fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour.³

(3) By *sec. 16*, setting fire to crops cut down, or to any wood, coppice, or of hay, corn, &c., whether standing or plantation of trees, or to any heath,

1215. *Sec. 8.* "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building whereby the life of any person shall be endangered, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

24 & 25 Vict.
c. 97.
Destroying or
damaging a
house with
gunpowder, any
person being
therein.

1216. *Sec. 10.* "Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods, or chattels, shall, *whether or not any explosion take place*, and whether or not any damage be caused, be guilty of felony," liable to penal servitude not exceeding fourteen nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.⁴

Attempting to
destroy
buildings with
gunpowder.

1217. *Sec. 11.* "If any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down, or destroy, any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, or any building other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor-law union,

Rioters de-
molishing
church
building, &c.

gorse, furze, or ferg, is a felony, punishable by fourteen years' penal servitude; and by *sec. 17*, setting fire to any stack of corn, hay, straw, furze, turf, coals, wood, bark, &c. is a felony, punishable by penal servitude for life.

(4) By *sec. 33*, "unlawfully and maliciously pulling or throwing down or in anywise destroying any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct, or aqueduct any highway, railway, or canal shall

pass, or doing any injury with intent and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same, or any part thereof, dangerous or impassable," is a felony, punishable by penal servitude for life.

The act in other sections provides for the punishment of malicious injuries to railways, electric telegraphs, works of art, &c.

As to obstructions on railways, see § 1137 (3).

24 & 25 Vict.
c. 97.

Rioters destroy-
ing machinery,
&c.

parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals, from any mine, every such offender shall be guilty of felony," liable to penal servitude for life or not less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.⁵

Rioters
injuring,
building,
machinery, &c.

1218. *Sec. 12.* "If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggonway, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and liable to penal servitude not exceeding seven years nor less than three years, or imprisonment not exceeding two years with or without hard labour.⁶

Killing or maim-
ing cattle.

1219. *Sec. 40.* "Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle, shall be guilty of felony," liable to penal servitude not exceeding fourteen nor less than three years, or to imprisonment not exceeding two years, with or without hard labour, and solitary confinement.⁷

Sending letters
threatening to
burn or destroy
buildings, farm-
produce, or to
injure cattle.

1220. *Sec. 50.* "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce,

(5) Upon the trial of any person for any felony under this section, if the jury or court martial are not satisfied that such person is guilty thereof, but find that he is guilty of any offence in sec. 12 (§ 1218), he

may be punished accordingly.

(6) This section does not specify solitary confinement.

(7) Art. 106 applies only to a soldier *ill-treating* his horse.

or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony," liable to penal servitude for ten years or not less than three years, or to imprisonment not exceeding two years, with or without hard labour and solitary confinement.

1221. FORGERY is the false making, altering, or adding to any writing or document to the prejudice of another's right. It is a misdemeanor at common law, and has been declared felony by statute in a great variety of cases, but is no longer capital in any instance. It is not intended to enter at all into detail upon the subject of forgery. To establish the offence, whether at common law or by statute, it is necessary to prove that the *false making* or the *altering* or *adding to the genuine instrument* was with an *intention* to defraud,⁸ but it is not necessary to prove the publication of the instrument by which the fraud was purposed to be effected, nor that any injury had been sustained, nor is it any longer necessary to allege or prove an intention to defraud any particular person.⁹

1222. The forgeries which are at all likely to become the subject of investigation by courts martial, will be found in the following clauses of the 24 & 25 Vict. c. 98, consolidating and amending the statute law "relating to indictable offences by forgery." (Sec. 12.) "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, shall be guilty of felony," and liable to penal servitude for life or not less than three years, — or imprisonment not exceeding

24 & 25 Vict.
c. 67.

Forgery
defined,

no longer
capital.
Evidence to
a general intent
to defraud
is sufficient.

Forgeries,
by statute.

Forging, utter-
ing, or putting
off bank notes,
&c.

felony.

(8) Where the intention is merely to deceive, the offence does not come within the definition of forgery. This observation might seem superfluous, except that this mistake has been made subject of remark by the highest authority. Producing forged passes to non-commissioned officers or others on duty at gates or sally-ports, and similar acts of misconduct, are military offences punishable under the 108th article.

(9) 24 & 25 Vict. c. 98, s. 44.

24 & 25 Vict.
c. 97.

two years with or without hard labour and solitary confinement.

Forging wills.

Forging or
uttering forged
bills of ex-
change or
promissory
notes.

Forging orders,
receipts, &c.,
for money,
goods, &c.

Obliterating
crossings on
cheques.

1223. The following offences are also declared felonies, and rendered liable to the same punishment. (*Sec. 21.*) "Who-soever, with intent to defraud, forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument;" (*sec. 22*) "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement or assignment of any such promissory note, with intent to defraud; and (*sec. 23*) "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent in any of the cases aforesaid to defraud, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or imprisonment not exceeding two years, with or without hard labour, and solitary confinement.

1224. *Sec. 25.* "Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words "and company," or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony," and liable to penal servitude for life or not less than three years, or imprisonment not exceeding two years, with or without hard labour and solitary confinement.

1225. **BREAKING QUARANTINE.**—The acts on the subject are repealed, and laws of quarantine were consolidated in the 6 Geo. 4, c. 78. The provisions in this statute are numerous: but it is only necessary to observe, that breaking quarantine is no longer a felony punishable by death, such punishment being superseded by the following provisions: Commanders or masters¹⁰ of vessels liable to quarantine, are prohibited from quitting the vessel under quarantine, or from permitting any person whatever to do so, under a penalty of four hundred pounds. Passengers or other persons arriving in such vessels, or going on board them and quitting them before discharged, and landing or attempting to land in the United Kingdom, are subject to an imprisonment of six months and a penalty of three hundred pounds. Persons refusing to repair to a lazaret, or breaking therefrom, are liable to a penalty of two hundred pounds. *Landing*, or receiving from vessels under quarantine, goods, merchandize, luggage, wearing apparel, books or letters, is punishable by a penalty of five hundred pounds; and conveying, secreting, or concealing for the purpose of conveying such articles from a vessel under quarantine, or from any lazaret, is punishable by a fine of one hundred pounds.

QUARANTINE.

Penalty on commanders quitting vessels when subject to quarantine, &c.

Penalty on passengers;

refusing to repair to, or breaking from any lazaret.
Landing goods, letters, wearing apparel, &c.

(10) There is one offence not immediately connected with the object of the present enquiry, which it may be as well to notice, as it has been committed where the only existing judicature was a court martial (at Monte Video, in 1807), and may again occur under similar circumstances. By the statute 17 & 18 Vict. c. 104, s. 206, it is enacted: "If any master or any other person belonging to a British ship wrongfully forces on shore and leaves behind, or otherwise wrong-

fully and wilfully leaves behind, in any place, on shore or on sea, in or out of Her Majesty's dominions, any seaman or apprentice belonging to such ship, before the completion of the voyage for which such person was engaged, or the return of the ship to the United Kingdom, he shall for each such offence be deemed guilty of a misdemeanor,"—punishable (*sec.* 518) by fine or imprisonment, with or without hard labour.

APPENDIX.

No. I.

Form of Warrant under the Sign Manual, empowering General Officers in command at home to assemble General Courts Martial.

(SIGN MANUAL.)

(SEAL.)

1250.

IN pursuance of the Provisions of the Mutiny Act, and of Our Articles of War hereunto annexed,—We do hereby authorize and empower you from time to time, as occasion may require, to convene, or cause to be assembled, General Courts Martial, for the Trial of any Officer or Soldier of Our Forces under your Command, who is, or shall be charged with any Offences against the Rules of Military Discipline, whether the same shall have been committed before or after you shall have taken upon yourself such Command; every of which Courts Martial shall be constituted, and shall proceed in the trial of such Charges, and in giving Sentence and awarding Punishment, according to the Rules prescribed by the said Act of Parliament and Articles of War. We are further pleased to order that the Proceedings of such Courts Martial shall be transmitted to Our Judge Advocate General, in order that he may lay the same before Us for Our Consideration, and afterwards send them to Our General Commanding in Chief, or in his absence, to the Adjutant General of Our Forces, for Our Decision thereupon. And for so doing, this shall be, as well to you, as to all others whom it may concern, a sufficient Warrant and Authority.

1251.

Given at our Court at ———, this ——— day of ———,
18—, in the ——— year of Our Reign.

By Her Majesty's Command.

(Signature of Secretary of State.)

To

The General,
or Officer Commanding.

No. II.

Form of Warrant under the Sign Manual, enabling Officers in command abroad to assemble General Courts Martial, &c.

(SIGN MANUAL.)

1253. In pursuance of the Provisions of the Mutiny Act, and of Our Articles of War hereunto annexed,—We do hereby Authorize and empower you, from time to time, as occasion may require, to convene, or cause to be Assembled, General Courts Martial, for the Trial of any Officer or Soldier of Our Forces under your Command, who is, or shall be charged with any Offences against the Rules of Military Discipline, whether the same shall have been committed before or after you shall have taken upon yourself such Command; and We do hereby further Empower you to direct your Warrant to any Officer (not under the degree of a Field Officer) having the Command of a body of Our said Forces, Authorizing him to convene Courts Martial, for the Trial of Offences committed by any Officer or Soldier under his Command, every of which Courts Martial shall be constituted, and shall proceed in the Trial of such Charges, and in giving Sentence, and awarding Punishment, according to the Rules prescribed by the said Act of Parliament and Articles of War.
- SEAL.
1254. And We do hereby further Authorize and Empower you, when, and as often as any Sentence is given and passed by a General Court Martial, legally constituted as aforesaid, to cause such Sentence to be put in Execution, or to Suspend, Mitigate, or Remit the same, *as you shall judge best, and most conducive to the good of Our Service, without waiting for Our further Orders, except in the case of a Commissioned Officer adjudged to suffer Death, Penal Servitude, or to be cashiered, dismissed, or discharged; in which case, as in other instances wherein you shall think it proper¹, to suspend the Execution of any Sentence, the proceedings of the Court Martial upon such Trial are to be transmitted to Our Judge Advocate General, in order that he may lay the same before Us, and afterwards send them to Our General*

(1) In the warrant which was issued to General Lord Raglan, G.C.B., when he was appointed to the command of the Forces to be employed in Turkey, the words printed in italic were replaced by the following: "as you shall see cause, and in every case in which capital punishment shall have been awarded by a General Court Martial, instead of causing such sentence to be carried into execution, you are hereby authorized, if you think proper, to order the offender to be transported as a felon, either for life or for a certain term of years, or to be kept in penal servitude, as you shall think proper."

Lord Raglan assumed the command on the 30th April, 1854, and the Mutiny Act of that year, containing the corresponding alteration in the twenty-first section (now sixteenth), received the Royal assent on the 23rd March.

Commanding in Chief, or in his absence, to the Adjutant General of Our Forces, for Our decision thereupon.

1255.

And that there may not in any case be a failure of Justice from the want of a proper Person authorized to act as Judge Advocate, We do hereby further Empower you, in default of a Person appointed by Us, or deputed by the Judge Advocate General of Our Forces, or during the Illness or occasional Absence of the Person so appointed or deputed, to nominate and appoint a fit Person, from time to time, for executing the Office of Judge Advocate of any Court Martial, for the more orderly Proceedings of the same. And for enforcing the adjudication or sentence of every such Court Martial, We do also give you Authority to appoint a Provost Marshal to use and exercise that Office, as it is usually practised in the Law Martial; and for executing the several Powers, Matters, and Things herein expressed, these shall be, as well to you, as to the said General Courts Martial, and all others whom it may concern, a sufficient Warrant and Authority.

Given at Our Court at St. James', this — day of —, 186—, in the — Year of Our Reign.

By Her Majesty's Command.

(Signature of Secretary of State.)

To

The General,
or Officer Commanding the Forces.

No. III.

Form of Warrant under the Sign Manual empowering the Commanders in Chief in the East Indies and China, and the Commanders of the Forces at the three Presidencies, to assemble General Courts Martial, &c.

(SIGN MANUAL.)

1256.

In pursuance of the Provisions of the Mutiny Act, and of Our Articles of War hereunto annexed, We do hereby authorize and Empower you from time to time, as occasion may require, to convene, or cause to be assembled, General Courts Martial for the trial of any Officer or Soldier of Our Forces under your Command, who is, or shall be, charged with any offence against the rules of Military Discipline, whether the same shall have been committed before or after you shall have taken upon yourself such command.

(SEAL.)

1257.

And We do hereby further empower you to direct your War-

rant to any Officer not under the degree or below the rank of a Field Officer (*under your Command*), having the Command of a body of Our said Forces, authorizing him to convene Courts Martial for the Trial of Offences committed by any Officer or Soldier under his Command, every of which Courts Martial shall be constituted, and shall proceed in the trial of such Offences, and in giving Sentence and awarding Punishment, according to the rules prescribed by the said Act of Parliament and Articles of War. See § 1265.

[And We do hereby further authorize and empower you when, and as often as, any Sentence is given and passed by a General Court Martial legally constituted as aforesaid, to cause such Sentence to be put in execution, or to suspend, mitigate, or remit the same, as in your discretion you shall see cause. And in every case in which a Capital Punishment shall have been awarded by a General Court Martial, instead of causing such Sentence to be carried into execution, you are hereby authorized, if you think proper, to order the Offender to be kept in Penal Servitude either for life, or for a certain term of years as to you shall seem meet.] 1258.

And We do hereby further authorize and empower you when, and as often as, any Sentence given and passed by a General Court Martial legally constituted as aforesaid, shall come before you, or be referred, or sent to you for confirmation, or decision, to cause such sentence (except in the case of a Commissioned Officer who may be adjudged to suffer death, penal servitude, or cashiering) to be put in execution, or to suspend, mitigate, or remit the same, as in your discretion you shall see cause. 1259.

And in all cases of Commissioned Officers who may be adjudged to suffer death, penal servitude, or cashiering, as well as in any other instances wherein you shall think it proper to suspend the execution of any Sentence, you are to refer the proceedings to the General Commanding in Chief of our Forces in the East Indies, or to the Officer acting as such for the time being, to use his discretion as to the suspension, commutation, mitigation, remission, or execution of the same, as in his judgment may appear best, according to the authority vested in him by Our Warrant, bearing Our Sign Manual to that effect; it being at the same time understood that such reference is to be confined to the cases of Commissioned Officers or Soldiers employed on Our Staff, or serving in any Regiment or Corps of Our Army in the East Indies. 1260.

And We do further, in pursuance of the Provisions of an Act of the 7th Victoria, cap. 18, entitled "An Act to remove Doubts as to the Power of appointing, convening, and confirming the Sentences of Courts Martial in the East Indies," by this Our Warrant, empower you to authorize any Officer not under the 1261.

degree or below the rank of a Field Officer (under your Command), having the Command of any body of Troops, either of Our Army or of Our Indian Forces serving in Our Territories, or in any State under the Government or Protection of Us, or in the Territories of any Foreign State, to confirm all such Sentences of General Courts Martial which shall be holden for the Trial of Offences committed by any Officer, Soldier, or Follower, of or belonging to such Troops, as you may think fit: Provided that nothing in this Warrant shall be deemed or taken to empower you to authorize any Officer to confirm any Sentence of Death, Penal Servitude, or Cashiering, on any Commissioned Officer employed on Our Staff, or serving in any Regiment or Corps of Our Army, or on any Commissioned Officer of Our Indian Forces.

1262. And that there may not in any case be a failure of justice from the want of a proper person authorized to act as Judge Advocate, We do hereby further empower you, in default of a Person appointed by Us, or deputed by the Judge Advocate General of Our Forces, or during the illness or occasional absence of the Person so appointed or deputed, to nominate and appoint, or to delegate to any Officer duly authorized to convene a General Court Martial, the power of appointing a fit Person, from time to time, for executing the office of Judge Advocate at any Court Martial for the more orderly proceedings of the same.

1263. And for enforcing the adjudication or Sentence of every such Court Martial, We do also give you authority to appoint or to delegate to any Officer duly authorized to convene a General Court Martial, the power of appointing a Provost Marshal, to use and exercise that office, as it is usually practised in the Law Martial.

1264. And for executing the several powers, matters, and things herein expressed, these shall be as well to you, as to the said General Courts Martial, and all others whom it may concern, a sufficient Warrant and Authority.

Given at Our Court at ———, this ——— day of ———,
18—, in the ——— year of Our Reign.

By Her Majesty's Command.

(*Signature of Secretary of State.*)

The General

or Officer Commanding [in Chief]

the Forces [in the East Indies (China)]

(*Bengal, Madras, Bombay*).

1265. *Note.* — The words and paragraphs in *italic* are inserted *only* in the three Warrants addressed to the Generals commanding at

the several Presidencies, and those parts [within brackets] only in the Warrants to the Commander-in-chief in India and China.

The parts not marked are common to all these Warrants.

No. IV.

Form of Warrant under the Sign Manual, enabling Officers in command to assemble District or Garrison Courts Martial, &c. &c. &c.

(SIGN MANUAL.)

(SEAL.)

IN pursuance of the Provisions of the Mutiny Act, and of Our Articles of War hereunto annexed, We hereby authorize and empower you, from time to time, as occasion may require, to convene, or cause to be assembled, District or Garrison Courts Martial, for the Trial and Punishment of any Soldier belonging to Our Forces under your Command, who is, or shall be charged with Mutiny or Desertion, or with any other the Offences mentioned in the said Act of Parliament and Articles of War, as liable to be tried by such Courts, or with any other Misdemeanor or Misbehaviour, contrary to the Rules of Military Discipline.

1266.

And We do hereby further Empower you to direct your Warrant to any Officer, not under the degree of a Field Officer, (*Captain*¹), having the Command of a body of Our Forces [(not less than four Troops or Companies²),] Authorizing him to convene from time to time, and without special reference to you, such Courts Martial as occasion may require, for the Trial and Punishment of any Soldier under his command; which said District or Garrison Courts Martial shall be constituted, and shall proceed in the Trial of the Offenders, and in giving Sentence, and awarding Punishment, (not extending to Death or Penal Servitude,) according to the Powers and Directions contained in the said Act of Parliament and Articles of War.

1267.

And We do hereby Authorize you, or the Officer on whom your Command may devolve during your absence, to receive the Proceedings and Sentences of such Courts Martial, to cause the same to be put in execution, or to suspend, mitigate, or remit the same, as shall be best for the good of Our Services.

1268.

(1) *Captain* in the warrant to the officer commanding on the Western Coast of Africa.

(2) The parenthesis [marked thus] is not in the warrants to officers *abroad*,

1269. *³And We do further authorize you according to the discretion vested in you, to delegate your authority for confirming, suspending, mitigating, or remitting the Sentences of Courts Martial to any Officer under your command not under the Rank of a Field Officer, (Captain)⁴ at those Stations only at which Inconvenience to Our Service might arise, if the execution of the Sentence were delayed until reference could be had to you.*

1270. And for so doing, this shall be, as well to you, as to the said District or Garrison Courts Martial, and all others whom it may concern, a sufficient Warrant and Authority.

Given at Our Court at *St. James's*, this ——— day of
———, 186—, in the ——— Year of Our Reign.

By Her Majesty's Command.

(*Signature of Secretary of State.*)

To

The General or Officer
Commanding the Forces.

No. V.

Form of Warrant by a Commander of the Forces (abroad) to a superior or Field Officer, having the Command of a body of Troops, authorizing him to convene General Courts Martial.

By His Excellency the General (or Officer) Commanding the Forces (or in Chief) ———, to the Major-General or Officer Commanding ———.

1271. (*N.B.—The names of the Officers are not inserted. The Warrants under the Sign Manual are not personal in any case.*)

1272. By virtue of a Warrant under Her Majesty's Sign Manual, bearing date the ——— day of ——— 186 —, empowering me (amongst other things) to direct my Warrant to any officer (not under the degree of a Field Officer) having the Command of a body of Her Majesty's Forces, authorizing him to convene Courts Martial for the Trial of Offences committed by any Officer or Soldier under his command; every of which Courts Martial shall be constituted and shall proceed in the Trial of such Charges, and in giving

(3) The paragraph in *italic* is not in the warrants directed to general officers commanding districts and divisions at home and in the Channel Islands.

(4) *Captain* is substituted in the warrant to the officer commanding on the Western Coast of Africa.

Sentence, and awarding Punishment according to the Rules prescribed by the Mutiny Act and Articles of War; I do hereby authorize and empower you to convene General Courts Martial, for the aforesaid purposes, and according to the Rules and Regulations prescribed.

And you are hereby directed to cause the Proceedings of such Courts Martial to be transmitted to me, or other, the General or Officer, commanding the Forces.

And for executing the several powers herein expressed, these shall be to you, as to the said General Courts Martial, and all others whom it may concern, a sufficient Warrant and Authority.

Given under my Hand and Seal at ——— this ———
day of ———

(Signature.) (SEAL.)

By Order of ——— Commanding the Forces.

(Signature.)

Assistant Adjutant General.

No. VI.

Form of Warrant by a General Officer to an Officer under his command, to convene District or Garrison Courts Martial.

By the Major General Commanding ——— to the Officer, not being under the rank of Field Officer (*Captain*)¹ Commanding ———.
(*The names of the Officers are not inserted.*)

By virtue of a Warrant under Her Majesty's Sign Manual, bearing date ———, 186 , empowering me (amongst other things) to direct my Warrant to any Officer (not under the degree of a Field Officer [*Captain*])¹ having the Command of a body of Her Majesty's Forces [(not less than Four Troops or Companies)]² authorizing him to convene, from time to time, and without special reference to me, or other, the General or Officer Commanding the Forces, such Courts Martial as occasion may require, for the Trial and Punishment of any Soldier under his Command, which said District or Garrison Courts Martial shall be constituted, and shall proceed in the Trial of the Offenders, and in giving Sentence, and awarding Punishment (not extending to Death or Transportation), according to the powers and directions contained in the Mutiny Act and Articles of War: I do hereby authorize and empower you to convene District or Garrison Courts Martial, for the aforesaid purposes, and according to the Rules and Regulations prescribed.

(1) *Captain* on the Western Coast of Africa.

(2) This parenthesis only at home.

1276. *And you are hereby directed to cause the Proceedings of such Courts Martial to be transmitted to me, or other, the General or Officer Commanding the Forces.*

1277. [And whereas Her Majesty has been pleased further to authorize me in my discretion, to delegate my Authority for confirming, suspending, mitigating, or remitting the Sentences of Courts Martial to any Officer under my Command, not under the rank of Field Officer (*Captain*)¹ at those Stations at which Inconvenience to Her Majesty's Service might arise, if the execution of the Sentence were delayed until reference could be had to me; I do therefore hereby authorize and empower you, when and as often as any Sentence is given and passed by a District or Garrison Court Martial, legally constituted as aforesaid, to cause such Sentence to be put in execution, or to suspend, mitigate, or remit the same, as you shall judge best and most conducive to the good of Her Majesty's Service, without waiting for my further orders, except in cases wherein you shall think it proper to suspend the execution of any Sentence, when you will cause the said proceedings to be transmitted to me, or other, the General or Officer Commanding the Forces.]

1278. And for executing the several powers herein expressed, these shall be to you, as to the said District or Garrison Courts Martial, and all others whom it may concern, a sufficient Warrant and Authority.

Given under my Hand and Seal at ———, this ———
day of ———, 186 —.

(Signature.) (SEAL.)

By order of ——— Commanding the Forces.

(Signature.)

Assistant Adjutant-General.

1279. *Note.*—Where it may be deemed expedient to authorize an Officer, at any Station to confirm the Sentence, the paragraph *in italic* (§ 1276) may be superseded by the paragraph (§ 1277) [within brackets.]

NO. VII.

Form of Letters Patent — Judge Advocate General.

1280. VICTORIA, by the GRACE of GOD, of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith, TO ALL TO WHOM *These Presents shall come, Greeting: WHEREAS,* We did by our Letters Patent under the Great Seal of Our United

(1) *Captain on the Western Coast of Africa.*

Kingdom of Great Britain and Ireland, bearing date at Westminster the — day of —, in the — year of Our Reign, give and grant unto Our right trusty and well-beloved Councillor —, the Office and Place of Advocate General or Judge Marshal of all Our Forces, both Horse and Foot, raised or to be raised for Our Service within the said United Kingdom of Great Britain and Ireland, and in all other Our Dominions and Countries whatsoever (except Our Dominions where particular Advocates General or Judges Martial are appointed), to hold, use, exercise, and enjoy the said Office and Place unto him the said —, by himself or his sufficient Deputy or Deputies, for and during Our Pleasure as by the said recited Letters Patent (amongst other things therein contained relation being thereunto had,) may more fully and at large appear: NOW KNOW YE that We have revoked And determined, and by these Presents DO revoke and determine the said recited Letters Patent, and every Clause, Article, and Thing therein contained, and FURTHER *know ye* that We of Our especial grace, certain knowledge, and mere Motion, and for and in Consideration of the good and acceptable Services to Us done, and to be done, by Our trusty and well-beloved —, as also for and in consideration of the Learning, Skill, and Ability of the said —, HAVE given, and by these Presents DO give and grant unto the said — the said Office and Place of *Advocate General or Judge Martial* of all Our Forces, both Horse and Foot, raised or to be raised for Our service within Our United Kingdom of Great Britain and Ireland, and in all other Our Dominions and Countries whatsoever (except Our Dominions where particular Advocates General or Judges Martial are appointed), to HAVE, *HOLD, use, exercise, and enjoy* the said office and place unto him the said — by himself or his sufficient deputy or deputies for and during Our pleasure, the same to be exercised according to the power and authorities given and allowed in and by an act of parliament made in the first year of the reign of Our late Royal ancestor, King George the First, entituled “An act for the better regulating the forces to be continued in His Majesty’s service, and for the payment of the said forces and of their Quarters,” and according to such other act or acts of parliament as shall from time to time be in force, allowing the executing martial law within the places aforesaid, together with all salaries, fees, pay, allowances, entertainments, profits, lodgings, and rooms for the office, rights, privileges, advantages, and emoluments whatsoever, to the office and place of advocate general or judge martial of Our said United Kingdom belonging or in anywise appertaining in as full and ample manner as the said — or any other person or persons hath or have held and enjoyed the same, And by these presents give and grant unto the said —, and to his sufficient deputy or deputies, full power and authority at such time and

1280.

1281.

times when martial law shall be allowed to be exercised as aforesaid, to administer an oath to any court martial or to any person or persons that shall be examined as a witness or witnesses in any cause, trial, or hearing before a court martial or any commissioners or persons whatsoever appointed or to be appointed to examine, hear, or determine any matters or complaints touching or in anywise concerning any military affairs whatsoever: AND WE DO *hereby* likewise grant unto the said ———, or to his deputy or deputies, full power and authority from time to time to administer an oath to any person or persons in order to the better discovering of the truth of any matter, cause, or thing which shall be at any time referred to or brought before him or them relating to any complaint or otherwise in any military matter whatsoever, at such time and times when martial law shall be allowed to be executed as aforesaid: And for the better advance of Our service in the execution of the said office, Our express will and pleasure is, that all officers and soldiers of Our said land forces obey him, the said ———, as Our Advocate General or Judge Martial, in that behalf constituted and appointed as aforesaid: And We also will that the said ——— observe such orders as he shall from time to time receive from Us or any Commanders-in-chief for the time being of Our said land forces, now or hereafter to be by Us thereunto authorized and commissioned: IN WITNESS whereof, We have caused these Our letters to be made patent: WITNESS Ourselves at Our palace at Westminster, this ——— day of ———, in the ——— year of Our reign.



No. VIII.

Form of Warrant (General)—Deputy Judge Advocate.

By ———, Judge Advocate General of Her Majesty's Forces,
to ———.

1282.

By virtue of the power and authority to me given by Her Majesty, I do hereby appoint you, the said ———, to act as Deputy Judge Advocate at all Trials by Courts Martial, and in all matters which shall concern any of Her Majesty's Land Forces from time to time serving in ———, pursuant to an Act of Parliament now in force, entitled "An Act for Punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters," or any other

Act of Parliament in that behalf which shall hereafter be in force, and to such Articles of War as shall from time to time be established during the continuance of the Power and Authority hereby given to you to act as aforesaid.

Given under my Hand and Seal this — day of —,
186—, in the — year of Her Majesty's Reign.
(*Signature of the Judge Advocate General.*) (SEAL.)

No. IX.

Form of Warrant (Special)—Deputy Judge Advocate.

By —, Judge Advocate General of Her Majesty's Forces, 1283.
to —.

By virtue of the power and authority to me given by Her Majesty, I do hereby appoint you, the said —, to act as Deputy Judge Advocate at a general court martial to be holden for the trial of —.

Given under my hand and seal this — day of —,
in the — year of Her Majesty's Reign.
(*Signature of Judge Advocate General.*) (SEAL.)

No. X.

Form of Warrant—Officiating Judge Advocate—Abroad.

By (*His Excellency*) the General (or officer) Commanding (*the Forces*) [the Troops] — to —. 1284.

By virtue of the power by Her Majesty to me given [by — (*Commander-in-Chief, India or China*) to me delegated], I do hereby *nominate and appoint* [appoint] you, the said —, to execute the office of Judge Advocate at a general court martial to be assembled at — on the — day of —, and for so doing this shall be to you and all others concerned full warrant and authority.

Given at —, this — day of —, 186—.
(*Signature.*)

Commanding the Forces (*or in Chief*).
By order of (*His Excellency*) — Commanding, &c.
(*Signature.*)

Assistant Adjutant-General.

1285. *Note.*—The words [between brackets] are applicable only in warrants by generals and officers in India and China who have received delegated powers.— (§ 1262.)

No. XI.

Form of Warrant—President of a General Court Martial.

1286. By virtue of Her Majesty's Warrant granted to me [a Warrant from the ——— Commanding ———], bearing date ——— authorizing me to convene, or cause to be assembled, from time to time, General Courts Martial for the Trial and Punishment of any Officer, Non-Commissioned Officer, or Soldier belonging to Her Majesty's Forces under my Command; I do hereby constitute and appoint you President of a General Court Martial to be assembled at ——— on the ——— day of ——— for hearing and examining into, according to the powers and directions contained in the Mutiny Act, and the Articles of War, all such matters as may then and there be brought before you. And, for so doing, this shall be a sufficient Warrant and Authority to you and all others concerned.

Given at ———, this ——— day of ———, 186—.

(Signature.)

By Order of ——— Commanding the Forces.

To

(Signature.)

&c. &c. &c.

Assistant Adjutant-General.

No. XII.

A Form of Summons to Witness.— (§ 896-7.)

1287. Whereas a ——— Court Martial has been ordered to assemble at ——— on ——— day, the ——— day of ———, 186—, for — — —; and Whereas it has been stated to me, that you ——— can give evidence, which is [have in your possession or under your control certain documents, viz.: ———, which are] material for the Trial and Determination of the matter then to be brought before the Court¹: I do therefore, by virtue of the Power and Authority in me vested, Summon and Require you to attend the sitting of the said Court on ——— the ——— day of ——— at ——— o'clock in the forenoon, [and to bring with you

(1) It is not unusual to specify, (when the court is held for the trial of a prisoner,) that the witness is required to give or produce evidence for the prosecution, or the defence, as the case may be, but the mutiny act makes no such distinction, and the prisoner is entitled to the compulsory process equally with the prosecution.

the ——— before mentioned,] and so to attend from day to day, until you shall be duly discharged; and you are Hereby Required and Commanded to lay aside all pretences and excuses, and personally attend on the aforesaid Court as herein directed, on pain of the penalties declared in an Act now in force for the Punishment of Mutiny and Desertion and other Crimes therein mentioned.

Given under my hand at ——— this ——— day of ———.

(Signature.)

Judge Advocate, &c., (if a General Court Martial,) or President, (all other Courts Martial.)

To

&c. &c. &c.

No. XIII.

Form —. *Proceedings of a General Court Martial, (See §490, note 1) together with forms in which some of the more unusual incidents in the examination of witnesses, &c., may be recorded.*

1288.

(1.)				
Proceedings of a General Court Martial held at ——— on the ——— day of ———, 186—, in pursuance of an order of ——— Commanding ———, dated the ——— day of ———, 186—.¹				
President.				
Members.				
2.² Rank.	Name.	Regiment.		
3. ———	———	———		
&c. &c.	&c. &c.	&c.		
14. ———	———	———		
15.³ ———	———	———		
Rank—Name—Regiment, Deputy Judge Advocate,				
At ——— o'clock the Court opens.				
(Rank—Name—Regiment.) [³(No.—Rank—Name—Regiment.)] appears a prisoner before the Court.				
The order for the assembly of the Court Martial, and the warrants appointing the President and Deputy [Officiating] Judge Advocate are read.				
The names of the President and Members are read over, and they severally answer to their names.				

Paging, § 478.

Heading (1).

Assembly of court, § 490.

Names, § 476.

1289.

Prisoner, § 470.

Orders and warrants, &c., § 493.

(1) For the case of minor courts martial permitted to try grave offences, see § 267.

(2) The numbers show the order of the members according to seniority.

(3) If the prisoner is a non-commissioned officer or soldier.

Paging, § 478.

1290.

Proffer of challenge, § 485.

None made.

President challenged.

For cause, § 500.

Objection

disallowed by court,

referred to appointing authority, § 497, and disallowed by him.

1291.

Objection to member,

frivolous, § 500.

Challenge overruled by court.

Evidence received as to alleged ground of challenge, § 500.

(2.)

Do you object to being tried by the President or any of the officers whose names you have heard read over? Question to the prisoner.

Answer.

The Prisoner does not object to any officer.

The Prisoner objects to the President, and states [is directed to state his objection, and thereupon states] that — — — —.

The Prisoner, in support of his objection, requests permission to call ———.

——— is called into Court, and is questioned by the Prisoner. Question by prisoner.

(The objection to the President, together with any evidence, is recorded on the proceedings, and any explanation or statement is made by him in open court, as by any other officer.) Answer.

The Prisoner has no further questions to ask [nothing further to add]. Question by prisoner.

The Court (*a majority of two-thirds*, §616 (5), *is requisite*, §497) disallows the objection made to the President.

The Court suspends its proceedings, and refers the prisoner's objection to ———.

At ——— o'clock the Court resumes its proceedings, and a letter, (&c.) is read to the prisoner, marked ———, and attached to the proceedings, [the Prisoner is informed that his objection has been referred to ———, who has disallowed his challenge to the President.]

The Prisoner objects to ——— and ——— and is directed to state his objection to (*the senior of these officers*, §497 [1]). Answer.

The Prisoner states — — —.

Objection to ———

The Court is cleared.

The Court is of opinion that (*the circumstance alleged by the prisoner*) is not any cause of exception to ——— [that the prisoner's objection to ——— is altogether frivolous]. Decision.

The Court re-opens, and the above decision is read to the Prisoner.

The Prisoner, in support of his objection to ———, requests permission to call ———. Objection to ———

(The member objected to) replies [explains] ——— — — and with the permission of the President proceeds to call ———. Statement by ———. Question by ———

Answer.	(The court has no power to administer an oath	
Question by prisoner.	to any witness, §500, but they are examined in the usual order, §953).	
Answer.	The Prisoner requests permission to observe —	
Question by — — — .		
	The Court is cleared.	
	The Court having deliberated on the above, do allow the challenge made by the Prisoner in respect to — — — .	Challenge allowed by court,
	— — — is informed that he is not required to serve on this Court Martial.	
	The Court re-opens, and the above decision is made known to the Prisoner.	and notified to prisoner.
New member.	(Rank — Name — Regiment) takes his place as a member of the Court.	1292.
Question to prisoner.	Do you object to being tried by — — — as a member of this Court Martial?	New member, § 499.
Answer.	(Any objection is dealt with as in the case of an original member.—§1291.)	
	The President, members, and Judge Advocate are duly sworn.	1293.
	The Court proceeds to the trial of Rank — Name — Regiment. [(No.—Rank—Name—Regiment.)]	Court sworn, : § 520.
	on the following [charges] charge :—	Arraignment, § 550.
Charge.	(Charge or charges at length.)	
	— — — — —	Plea of "guilty" or "not guilty."
Plea.	To which charge the Prisoner pleads — — — .	
	The Prisoner not pleading [refusing to plead] to the above charge, the Court enters a plea of "not guilty."	Prisoner stands mute, § 555.
Plea.	All persons required to give evidence are directed to withdraw [and the Court forbids the publication of the proceedings until after the termination of the trial.]	§ 559.
		§ 461.
		1294-
Plea.	The Prisoner pleads (in bar of trial).	Pleas in bar, § 556-66,
	The Court is of opinion that — — — is no reason why he should not be tried on the above charge [but he is at liberty to adduce evidence to this point on his defence] and do require him to plead to the charge.	overruled :
	The Court will receive any evidence which the Prisoner may wish to produce to the above point.	enquired into :
	(Witness examined on oath.)	
	The Court is of opinion that the Prisoner has	not allowed :

referred to con-
sideration of the
jury, § 571, 551.

not [has] substantiated — — — —, and [do there-
fore adjourn until further orders,] in consequence
proceed with the trial.

1295.

Prosecutor at
Court House,
§ 571,
555.

Prosecutor's
address,
§ 574.
Examination of
witnesses.

Prosecutor then
examined.

1296.

Prosecutor ex-
amines witness,
§ 575.
The prisoner
cross-examines
witnesses for
prosecution,
§ 577.

defers, § 577.

or declines to do
so (5).

1297.

Adjournment,
§ 524.

Incidents on the
Court re-assem-
bling, § 525:

all present:

(Rank—Name—Regiment,) appears as prose- PROSECUTION.
cutor.

And being duly sworn, states ———

And proceeds, by permission of the Court, to
call evidence in support of the charge.

And by permission of the Court reads an address,
which is marked — and attached to the proceedings. First witness
(The prosecutor) being duly sworn, states, "I," &c.

(The prosecutor's evidence is given and recorded for prosecution.
on the proceedings as that of any other witness,
§ 571.)

(The prosecutor is then cross-examined by the
prisoner, unless he defer it, § 577.)

(Rank—Name—Regiment) being duly sworn. First witness
(The witness is examined by the prosecutor.) for prosecution.

(The witness may then be cross-examined by the Question by
prisoner.) prosecutor.

(The witness may then be re-examined (§ 577) by Answer.
the prosecutor.) Question by

(The witness may lastly be questioned by the Court.) prisoner.
The witness withdraws. Answer.

The Prisoner requests permission to defer his Question by
cross-examination of the witness. prosecutor.

The Prisoner does not wish to put any questions Question by
to [declines cross-examining] this witness, who court.
withdraws.⁵

—— being duly sworn, is examined by the Second witness
Prosecutor. for prosecution.

(The examination, &c., proceeds as above, § 1296.) Question by, &c.

At — o'clock the Court adjourns until — Court adjourns.
o'clock to-morrow the —.

On —, the — of —, 186 —, at — Second day.
o'clock, the Court re-assembles, pursuant to ad-
journment,

present the same members as on yesterday, and Second witness
proceeds with the examination [cross-examination] for prosecution.

(5) In every case where the prisoner does not cross-examine a witness for
the prosecution, at least where the prisoner is not an officer, it should be made
to appear, on the face of the proceedings, that he has had the opportunity given
him of so doing.

(Examination continued.)	of _____. (No proceedings can take place in the absence of either president or judge advocate.) (Rank—Name—Regiment) being absent. (The absence is accounted for.) The Judge Advocate produces a medical certificate, which is read, marked —, and attached to the proceedings.	member absent; member sick.
Court adjourns.	The Court adjourns until _____. The Court, being below the number required by the mutiny act, is adjourned until further orders. There being present (not less than the least number required by the mutiny act) members, the trial is proceeded with.	§ 528. § 524. § 526.
Second day.	On _____, the _____ of _____, 186—, at _____ o'clock, the Court re-assembles, in pursuance of a _____ order by _____. The Prosecutor and Prisoner are present.	1298.
_____ appointed president.	A warrant is read, bearing date _____, appointing (the senior member) president of the court martial in the place of _____ who — — —.	New president appointed, § 529.
_____ appointed judge advocate.	The trial is proceeded with. A warrant is read, bearing date _____, appointing _____ to act as Judge Advocate in the place of _____, who — — —. _____ is duly sworn. The trial is proceeded with.	1299. Judge advocate absent; another is appointed, and sworn, § 532.
Question by prosecutor [prisoner].	(The question is entered on the proceedings, §969.) The President (a member) objects to this question. The Prisoner [witness] objects to this question. [submits that this question — — —, &c., §574].	1300. Objections to questions:
Question by the court: objected to:	(Question by an individual member.) The _____ requests that the sense of the whole of the Court may be taken as to the above question.	question proposed by a member: relevancy questioned, § 576.
withdrawn.	The _____ does not wish to press the question [with reference to the objection requests permission to observe — — —.]	
Court cleared.	The Court is cleared.	
Decision.	The Court decides — — [suggests an alteration.] The Court re-opens and the above decision is read.	Decision of court allowing question.
Question repeated.	(If not disallowed) The above question [as altered by the Court] is put to the witness.	

1301.
Witness claims
privilege in not
answering ques-
tions tending to
criminate or
degrade, § 961-9.

§ 968.

1302.

Correction by
witness, before
leaving the court
(§ 960),
of a mistake in
recording his
evidence,

of an inaccuracy
of his own.

1303.
Defence, § 581.

§ 581-5.

1304.
Witnesses for
defence.

The witness claims the protection of the Court, Objected to submits that this question tends to criminate [to by witness : degrade] him.

The Court is cleared.

court cleared :

The Court decides. — — — —.

The Court re-opens and the above decision is decision.
read.

The question is repeated to the witness, who
[states in reply] declines to answer it.

— — — — being duly sworn (*is examined*, — — witness
&c., as above.) for prosecution.

Upon the above evidence being read over to the
witness,

He points out that he had said — — —
and not — — — as has been taken down —

(See above, page — — — — marked — — — — in the margin.⁶) Correction.

He begged [to explain] to add — — —.

(*The witness may be examined and re-examined
with reference to any fresh statement.*—§960.)

The witness withdraws.

The prosecution is closed.

The Prisoner being placed on his defence
calls — — — — to speak to his character.
states — — — —, and proceeds to call
evidence.

DEFENCE

requests to be indulged with — — — [hours] days
to prepare it.

The Court grants this request, and in consequence
adjourns at — — o'clock until — — —, the — — —
day of — — —, at — — o'clock A.M.

On — — —, the — — — day of — — —, 186—, at — — Third day.
o'clock, the Court meets pursuant to adjournment, Defence.
present the same members as on — — —.

The Prisoner enters on his defence and proceeds
[by permission of the Court, to read an address
which is marked — — — and attached to the pro-
ceedings,] to call evidence.

First witness

(*Rank—Name—Regiment, &c.,*) is called into
Court and duly sworn.

for defence.

Question by

(*The prisoner first examines witnesses to meet the
charge, and secondly to speak to character, §581.*) Answer.

prisoner.

(6) No erasure is permitted, (see § 478, 578,) but a reference to the correction is made in the margin where the mistake occurred.

Question by prosecutor.	(Witnesses for the defence may be cross-examined by the prosecutor, re-examined by the prisoner, and questioned by the court.)
Question by prisoner.	The witness withdraws.
Question by court.	
Second witness for defence.	_____ is again called into Court and is examined on his former oath.
Question, &c.	(The examination of all the witnesses for the defence is conducted in the same order.)
Answer.	The Prisoner closes his defence with the following remarks, by reading an address which is marked _____ and attached to the proceedings.
	The Prisoner lays before the Court certificates from _____ and _____ which are read, and are marked, [copies thereof are marked] _____ and attached to the proceedings.
	The Court decide that the Prosecutor is not entitled to reply.
Reply.	The Prosecutor in reply — — — —.
	The Prosecutor declines making a reply.
	The Court is cleared.
	The Prisoner requests permission to (offer observations on the Prosecutor's reply, §605).
	The Court having closed, proceeds to deliberate.
	It being _____ o'clock, the Court adjourns until to-morrow the _____, at _____ o'clock.
_____ day.	_____ the _____ day of _____, at _____ o'clock, the Court re-assembles pursuant to adjournment.
_____ witness for _____ recalled.	The Court is re-opened; — — — — is recalled, and, the Prosecutor and Prisoner being present, is examined on his former oath.
Question by court.	— — — — —
	The Court is again closed, and resumes its deliberation.
Finding.	The Court having maturely weighed and considered the evidence before it [together with what the Prisoner (No.—Rank—Name—Regiment) has urged in his defence?] are of opinion that

1305.

§ 1047.

1306.

Reply:
not allowed, §599:
allowed, § 598.

1307.

Rejoinder.

1308.

Deliberation on finding.
Deliberation continued after adjournment, § 610:

interrupted for the purpose of a specific question, § 612.

1309.

Finding.
Forms of acquittal: § 624.

(7) This is not inserted in any case where the prisoner makes no defence, or where he confines it to the examination of witnesses, without addressing the court.

not guilty:

fact proved:
no criminality:
§ 622.

justification:
§ 1109, 1113.

1310.

Conviction.

In a case of em-
bezzlement, &c.

Substance
proved.
§ 834, 832-43,
but acquitted of
the more grave
offence.

that [He] the Prisoner (*No.—Rank—Name—Regiment*) is not guilty of the charge preferred against him, and do therefore acquit [honourably, fully, &c., acquit] him of the same.

that the facts alleged in the charge [with the exception of the words ———] have been proved, but attach no criminality thereto, and do therefore acquit, &c.

that [He] the Prisoner, (*Rank—Name—Regiment*) was justified [excusable under the circumstances] in ———, as alleged in the charge, and do therefore acquit, &c.

that [He] the Prisoner (*No.—Rank, &c.*) is guilty of the charge [the whole of the charges] preferred against him. Guilty.

And that the loss [damage] amounts to the sum of ——— [the sum of ———, as stated in the £—,—,—, charge.]

that [He] the Prisoner, (*absented himself without leave*), *lost by neglect*, as specified in the charge, but acquit him of (*desertion*), *designedly making away with the same*.

is guilty of the first charge, and guilty of the second charge, with the exception of — — — — — of which it acquits him.

1311.

Enquiry as to
previous convictions
and general
character, § 626.

Notice must be
proved,
§ 628, 419.

(*The court re-opens on a finding of guilt.*)

The Court re-opens, and the Prisoner being present (*Rank—Name—Regiment*) is duly sworn, and is examined by the Court.

Has the Prisoner been warned, previously to Question by trial, that evidence of previous convictions would be produced against him on this occasion? court.

He has; I warned him myself on ———.

Answer.

He has; I was present when, &c.

There are none.

The Court will receive evidence of previous convictions. By the court.

I produce — (*See § 628.*)

The certificate is read, marked ———, and attached to the proceedings. Certificate of previous conviction.

Question by court.	⁸ What is the Prisoner's [class] ⁹ and previous character, age, and service?	Enquiry as to general character, &c. (8) § 636.
Answer.	His age is — — years, and his service — — — —, [He belongs to the — — class ⁹], and his previous character — —. ⁸ The Court is cleared.	
Sentence.	The Court having found the Prisoner guilty of the charge preferred against him [a part of the charge preferred against him, as above specified,] — which being in breach of the articles of war, and having received evidence of — — — — previous convictions, [and of his general (<i>very good, good, fair, indifferent, bad, &c.</i>) character], ⁸ does now adjudge him the Prisoner (<i>No.—Rank—Name—Regiment</i>) to suffer death by being shot [hanged] at such time and place as — — — — may appoint.	1312. Wording of sentence, § 644.
— — — — years.	to suffer penal servitude for [life] the term of (See § 388 [2].) — — — — () years.	Death. Penal servitude.
	to be cashiered, &c. to be deprived of one penny a day of his pay for a period of — — — —. ¹⁰	Cashiering, dismissal, &c.
(Reduction.)	to be reduced to the ranks ¹⁰ [placed at bottom of the list, §160]	1313. Obligatory. (10) Forfeiture for drunkenness.
(Reduction and)	to be reduced to the ranks, and to be, &c. to be imprisoned [with hard labour] [with such labour as, in the opinion of the medical officer of the prison, be may be equal to] for — — — — and to be kept in solitary confinement for	Imprisonment. Solitary or otherwise.
— — — — days.	to make good the amount of — — — —.	
— lashes.	to undergo a corporal punishment of — — — — lashes in the usual manner, at such time and place as — — — — may appoint.	Corporal punishment.
(Forfeiture of past [and future] service)	And to be imprisoned, &c. And in addition, to forfeit all advantages as to to forfeit [all his] one distinguishing mark, and the good conduct pay allowed therewith for a period of (<i>not less than eighteen months, §159.</i>)	1314. Additional punishments.

(8) Not in the case of commissioned officers.

(9) The enquiry as to class applies to private soldiers only.

(10) "Where part of the sentence is obligatory, such as *reduction*, or, in cases of 'habitual drunkenness,' *forfeiture of pay*, it is to precede the award of any other punishment."—*Queen's Reg.*, p. 226.

Stoppages, § 699,
until amount
made good,

to an ascertained
amount,

1315.
Recommendation
of discharge, &c.,
§ 692.

1316.

Signature of
president,
§ 694.

1317.
Revision, § 719.

§ 720.

to be placed under stoppages —

— till the cost of replacing the (*regimental necessities, &c., specified in the charge [finding]*), be made good.

till the sum of — be made good according to the provisions of the 132nd Article of War.

And also to be marked with the letter D, according to the provisions of the 26th section of the mutiny act.

The Court having sentenced the Prisoner to forfeit all claims to additional pay, good conduct pay, and pension on discharge, do further recommend that he be discharged with ignominy from Her Majesty's Service [and also that he be marked with the letters BC, as provided in the 26th section of the mutiny act.]

Signed at —, this — day of —, 186—.

(Signature.)

President.

(Signature.)

Judge Advocate.

Stoppages.

Stoppage of

£—, —, —.

Letter (D).

Revision.

On —, the — day of —, at — o'clock, the Court re-assembles pursuant to an order (&c.), present the same members as on — — —.

The [The foregoing]¹¹ (*letter, order, or memorandum*) containing the instructions to the Court, and the reasons of (*the revising authority*) for requiring a revision of the (*finding or sentence*) is read.

is read and attached [a copy is attached] to the proceedings.

The Court having attentively considered — — — — — proceed to revise their former finding [sentence].

The Court is of opinion, &c.

(Form as above, §1309-10.)

The Court, &c.

(Form as above, §1312-15.)

Signed at —, this — day of —, 186—.

(President.)

(Judge Advocate.)

Revised
finding.

Revised
sentence.

(11) This form is applicable where the reasons, &c., are written below the original sentence.

<p>The Court having passed judgment, <i>Begs leave most respectfully to recommend the prisoner to the favourable [merciful] consideration of ——— (stating their reasons). Remarks on the conduct of the parties before it; on the manner in which a particular witness has delivered his testimony, &c., &c.</i></p> <p style="text-align: right;">(Signature of President.)</p> <p>(Signature of Judge Advocate.)</p>	<p>1318. Recommendation, § 699.</p> <p>Remarks, § 700-7.</p>
<p>Confirmed. [Approved and Confirmed.] I confirm the opinion and sentence of the Court, but [mitigate] remit — — —.</p> <p>(Date.) (Signature of Confirming Authority.)</p>	<p>1319. Confirmation. § 710-18.</p>
<p>I hereby approve [¹³As Civil Governor I further approve] the sentence of the Court upon (rank and name of prisoner) in behalf of Her Majesty.</p> <p>(Date.) (Signature of Civil Governor.)¹³</p>	<p>1320. Approval of sentence of death by Civil Governor, § 712-18.</p>

No. XIV.

Instructions as to Proceedings in the Civil Courts.

[Whilst this sheet has been passing through the press, the following circular has been issued under the authority of the Secretary of State for War.—29th January.]

“Circular, No. 799.

“WAR OFFICE,
26th January, 1863.

1321.

“The Secretary of State for War deems it expedient to issue the following instructions for the guidance of commanding officers and others.

(12) This approval on behalf of Her Majesty is equally necessary to the carrying into effect of a capital sentence in those cases where the confirming authority also administers the civil government.

(13) On certain occasions, the concurrence of the Governor-General in India (*Art. War*, 146) has been signified by the Secretary of the Military Department, but it does not appear desirable to draw this into a precedent elsewhere.

1322. "1. All crime punishable by the civil power, the commission of which is brought to the cognizance of the commanding officer, should forthwith be notified by the commanding officer to the chief constable of the county or borough, that the same may be duly investigated by the police, and punished by the ordinary criminal tribunals of the county or borough.
1323. "2. In cases of murder, where the accused and the deceased were both subject to the Mutiny Act, the commanding officer should request the magistrates forthwith to transmit a copy of the depositions taken before them to the Secretary of State, that the case may (if he deems it expedient that a more speedy trial of the accused should be had than the usual course of practice allows) be prepared for trial by the solicitor to the department under the 'Jurisdiction in Homicides Act, 1862.'
- See § 1122 (9).
1324. "3. Where commanding officers, or the men under their command, are made defendants in legal proceedings, whether of a civil or criminal nature, the defence thereof must be conducted upon the sole responsibility of such defendants.
1325. "4. When, in such cases, any claim is preferred to the Secretary of State for assistance in the defence or for the reimbursement of the cost thereof, it must clearly be shown with reference to the declaration or indictment (of which a copy should be sent with the application), that the act complained of was one sanctioned by competent authority, or clearly within the prescribed course of the defendant's duty.
1326. "5. Until the Secretary of State directs the solicitor to the department to take charge of the defence, or to reimburse the cost, he will incur no responsibility whatever on account thereof.

"EDWARD LUGARD."

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